CURRENT PROBLEMS

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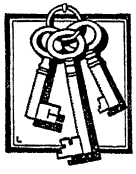

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POLITICS AND LAW IN THE UNITED STATES

CURRENT PROBLEMS

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POLITICS & LAW
IN THE
UNITED STATES

by

D. W. BROGAN

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TO

RICHARD JOYCE SMITH

OF THE

NEW YORK BAR

'We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.'

Preamble to the Constitution (1787).

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PREFACE

THE TITLE of this little book is doubtless unduly ambitious. There are many aspects of the relationship between law and politics in the United States that are not even hinted at and some, like the important question of 'dual federalism', the relationship between the States and the Union as seen by the Courts, which are barely hinted at. All that I have aimed at in writing this book has been to illustrate for British readers one aspect of American institutions, the extraordinary place given to written law in the organization of American government and politics. I have only attempted to illustrate the theme, not to exhaust it. I have borne in mind, all through, that the United States is a success—and a unique success. There is no free government of its age, power, and dignity covering so vast an area. Canada, Australia, Brazil are not really comparable with the United States in anything but area. They may, in the future, provide better solutions of the problem of organizing a continental area under a government, flexible enough to give free play to local interests and sentiments, and strong enough to preserve independence and to foster economic and social progress on a scale worthy of the natural resources of the area. But they have not done so as yet;

that is not necessarily their fault, or the fault of their institutions, but it is a fact. At a time when we are perplexed by the problem of organizing a peaceful Europe, there may be some utility in a book, however slight, that calls attention to the solutions adopted in America. Those solutions are not always elegant or even impressive, but they are solutions. They have been profoundly influenced by local history, which must always be allowed for in America—and still more in Europe. Those institutions have known one great failure, the Civil War, but on the whole they have succeeded. And they have succeeded because the American people have, in most cases, refused to let the best be the enemy of the good.

D. W. B.

28 *April*, 1941

CHAPTER I

THE CONSTITUTION

'Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form.'

F. D. ROOSEVELT, *First Inaugural*, 4 March 1933

I

IN a shrine in the Library of Congress two documents are preserved and constantly illuminated; every day there passes before the shrine a stream of pilgrims, inspecting—and revering—these fundamental documents of the American nation. For in a unique sense, the United States is built on known declared law and principle. Other countries have in their historical development great written professions of faith or codes of law: Magna Carta, the Declaration of the Rights of Man of 1789, the Twelve Tables of the Romans. Yet the English, French and Roman states were existent when these documents were written and it was these states which produced or accepted the written declarations of law and principle. But the American nation and the American government have a very definite beginning, and the birth of one and of the other is not merely recorded in these written records, for these documents are deeds as well as

treasures from the national archives. In one the fundamental political dogmas of the American people are set forth; in the other, the institutional form of the new state is described and delimited. It is true that the bold and generous temper of the Declaration of Independence is missing in the Constitution. Nor is the difference solely due to the fact that the Declaration is a manifesto and the Constitution a working blue-print. When the framers of the Constitution (whose chief author, Madison, was the closest disciple of the author of the Declaration, Jefferson) got down to brass tacks, they found, as Jefferson would have found, and as his own action as President shows he was prepared to find, that the adjustment between the fine general theories of liberty and their institutional embodiment is difficult. The 'contagion of the world's slow stain' affects polities as well as politicians and the makers of the American Constitution were realists. Much of the machinery they set up is designed to keep the chosen rulers of the people in their place. But behind and above the lawyers, politicians and even the formal law, lives the sovereign, 'We, the People of the United States' who, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America'. '*Do ordain*'; the will of the people is continuing in 1941 as in 1789; its form of

expression was defined but its powers were not limited by what was planned at Philadelphia in 1787. And since the preamble to the Constitution is not part of the Constitution, but a general declaration of purpose, it is properly borne in mind with the great proclamation of human rights which is the preamble to the Declaration of Independence. The American nation, at its birth, proclaimed not merely its own local rights or grievances, but asserted that it held 'these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness'.

In the minds of the American people, as in the shrine at Washington, these two preambles are indissolubly united. To the end of securing Life, Liberty and the pursuit of Happiness to themselves and their posterity, the American people ordained—and ordains—its political life. The programme is so ambitious that it is ludicrously easy to show how far it is from being completed, but the American people has not, in any generation, lost hope that its faith in things as yet unseen is not a faith in mere fantasies or fictions, and that there is entrusted to it in a special degree the duty of safeguarding the sacred trust handed down to it, of preserving liberty and of securing, as Lincoln said at Gettysburg, that 'government of the people, by the people, for the people shall not perish from the earth'.

The framers of the Constitution would have been surprised had they foreseen the blind reverence with which their work was to be regarded. It was, in their eyes, merely the best that could be done in difficult circumstances, not a model of ideal wisdom and foresight. 'The wisdom of the Convention was equal to something greater,' said William Pierce of Georgia, 'but a variety of circumstances...made it impossible to give the plan any other shape or form.'[1]

In the moderate words of John Quincy Adams, 'the Constitution was extorted from the grinding necessity of a reluctant people'. Hardly, nevertheless, had the Constitution gone into effect than the transforming miracle occurred. In the words of Woodrow Wilson: 'Even hostile criticism of its provisions...not only ceased, but gave place to an undiscriminating and almost blind worship of its principles....The divine right of kings never ran a more prosperous course than did the unquestioned prerogative of the Constitution to receive universal homage.'

Nor has this prerogative been seriously challenged till the other day. Other scepticisms have waxed and waned, but the worship of the Constitution has continued unabated. Walter Bagehot's appraisement of the English monarchy may, without exaggeration, be repeated of the Constitution, for by far the greater part of its history 'it has strengthened government with the strength of religion'.[2]

[1] Quoted in Homer Carey Hockett, *The Constitutional History of the United States*, 1776–1826, p. 222.

[2] E. S. Corwin, *Court over Constitution*, pp. 210–11.

That the Constitution was opposed when it was new and opposed by great national figures is admitted. 'Only those publicists concerned with the instant need of political controversies have been bold enough to deny that the fundamental law of the land was itself the product of one of the sharpest partisan contests in the history of the country.'[1] But what was a venial sin in Patrick Henry was a crime in later Americans, and American political thought was crippled by popular reverence for the literal inspiration of the Constitution. Its human origin was almost forgotten. No greater testimony to the magical power of the sacred text can be imagined than the fact that at the beginning of the Civil War the seceding southern states adopted, with few and not very important modifications, the federal Constitution as the fundamental law of the Confederate States of America. They fought to the end in the firm belief that *they* were the true defenders of the spirit and the letter of the tables of the law handed down from Philadelphia by the Sanhedrim of 1787.

II

To the man in the street, 'the Constitution' is the document whose certified original he can see in the shrine in Washington plus the twenty-one amend-

[1] Charles A. Beard, *Economic Origins of Jeffersonian Democracy*, p. 2.

ments since added to the original text. But to the lawyer or political scientist, the Constitution is not a given document of around six thousand words.

This . . . is only the '*formal*' sense of the term. In the 'material' sense a constitution is a body of rules in accordance with which a government is organized and operates; and in this sense 'the Constitution of the United States' comprises a vastly extended system of legislation, customs and adjudications, of which the constitutional document is, as it were, but the nucleus, and into which it tends ever to be absorbed.[1]

The basic doctrine of the Constitution, whether that be taken as meaning the primitive text or the tradition, written and oral, which has grown up around it, is that the federal government is limited and its powers separated. America is spiritually a democracy; and progress to formal democracy has been reflected in such amendments as the first ten, which make up the 'Bill of Rights' (1791), and the seventeenth (1913), which transferred the right of electing Senators from the State legislatures to the people of the States. But democracy is tempered in the United States by reverence for the Constitution, even when that instrument most conspicuously defies the dogma of arithmetical equality.

The doctrine of the separation of powers is not stated in so many words in the Constitution, but it is

[1] E. S. Corwin, *The Constitution and What It Means To-day* (8th edition), pp. 86–7.

assumed all through it.[1] All powers not 'delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people'.[2] The distribution of powers between the Union and the States has been settled mainly by judicial decision—and by a great civil war. The separation of powers within the federal government has been settled in different ways and at different times, according to the pressure of events and of personalities. But it is to be noted that at no time has either House of Congress or the President been deprived in fact, or in law, of the main functions conferred by the Constitution, that neither the executive nor the legislative nor the judiciary has been able to carry very far a policy of abdication or usurpation. There have been strong and weak Presidents, Congresses and Courts; there have even been times when the Senate has been docile and Senators modest, but there has been no atrophying of functions. Each branch of the government has at times been hated or ignored by the people, but until the sovereign has acted in the manner laid down for it in

[1] The classical statement of the doctrine can be found in the Bill of Rights of the Constitution of Massachusetts (1780): 'Article XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: *to the end that it may be a government of laws and not of men.*'

[2] *The Constitution*, Tenth Amendment.

the Constitution, and asserted its constituent power in an amendment, the unpopularity or even the contempt felt for one or more branches of the government has not worked to deprive them of their prerogatives.

The most conspicuous example of the degree to which constitutional law has limited democratic dogma is the role of the Senate. If by democracy we mean the easy enforcement of the will of the numerical majority, the American Senate is a most undemocratic body. In it every state is equally represented by two Senators; Nevada with less than 100,000 inhabitants has two; so has New York with over 12,000,000. And if it can be rightly argued that this equality in the Senate was the fundamental compromise of the Constitutional Convention of 1787, the guarantee offered to the small but really sovereign states that agreed to enter the new and more perfect or, at least, closer union, that historical argument hardly adds much to the moral claims of a state like Nevada which was created solely by the power of the Union so that Lincoln might have three extra electoral votes in 1864. Many of the states most grossly over-represented have never had any political life—other than that given them by the Union, which bought the territory out of which they were formed from France, or conquered it from Mexico. Delaware and Rhode Island surrendered something when they entered the Union; Arizona and Montana had to be made by the United States before sovereignty could be imposed on them. Yet American reverence for the

Constitution has been equal to the task of failing, except in great emergencies, to ask what the current Senate majority represents, of translating into political reality the fictitious equality of an American equivalent of Luxembourg with an American equivalent of Britain.

Nor is this all. For some of its most important functions, the American Senate needs to assemble a two-thirds majority. Thus the ratification of a treaty needs a two-thirds majority and that may well be hard to find, when sectional and party interests may unite one-third plus one of the Senate to kill a treaty negotiated with all solemnity by the President and approved by the majority of both Houses of Congress and by the American people. And the third plus one of the Senate may be composed of Senators elected from the empty acres of the West and, perhaps, elected four years before, in very different circumstances of internal and external politics.[1] Nor is the final vote the only chance the minority has of manœuvring to defeat a treaty. It may, 'because of the peculiar rule of the Senate which, since 1868, permitted amendments to be inserted or

[1] The motives that bring together the minority may be very diverse. The proposed adherence of the United States to the World Court in 1926, approved of by the platforms of both parties, was defeated by a combination displaying, so a witness said, '"more inharmony of thought, more discordant elements in ideas and beliefs than he had ever seen before. All Irish Catholic newspapers, for example, had bitterly denounced the Court as controlled by England, while the Klan organs were attacking it as dominated by the Pope"': G. H. Haynes, *The Senate of the United States*, vol. II, pp. 658–9.

reservations added by an ordinary majority'[1], take advantage of combinations of Senators who wish to amend some particular article, to produce a final version which nobody wants and which the other party to the treaty would, in all probability, refuse to accept. That senatorial control of treaty-making seriously hampers the conduct of American foreign policy cannot be doubted. Whatever may have been the case before 1919, no nation to-day is in the least likely to think that a treaty negotiated with the United States is a treaty accepted by the United States. And if it be argued that the Senate has seldom or never had its decisions overruled by the American people, it should be remembered that the American people may have no chance of passing judgment on most of the obstructive Senators for four years and, by that time, the situation may have changed so profoundly, in part as a result of the action of the Senate, that the policy it rejected is no longer practical politics. The American voters may then be pardoned for taking Bolingbroke's advice, 'to bear what they cannot alter'.

The true defence of the role of the Senate is not that most treaties that were defeated by the working of the two-thirds rule would have been defeated anyway.[2] It

[1] W. S. Holt, *Treaties Defeated by the Senate*, p. 294.

[2] 'The reasoning fails to take into consideration the psychological effect of the two-thirds rule upon the attitude of individual Senators or the fear which such a rule instils in the Department of State': R. J. Dangerfield, *In Defense of the Senate*, p. 312.

is that the Senate, like all organs of the federal government except the presidency, is, in the nature of things, a lawyer-ridden body. Treaties are, like statutes, part of 'the supreme law of the land'; they are scrutinized in the spirit of a captious corporation lawyer or, if you prefer it, of a zealous and prudent family solicitor weighing the dangers of a marriage settlement. This attitude is natural and praiseworthy in Senators. They are elected to be vigilant not only or primarily on behalf of the whole people of the United States, but of one state. That state has certain unalienable rights which its Senators must protect. This vigilance is extended to the foreign relations of the United States, where it is accentuated by the widespread but baseless belief that American diplomatic history consists of a series of confidence tricks played on innocent amateur American representatives by astute European professionals.

But fundamentally, the explanation if not the justification of the role of the Senate in foreign affairs, comes back to the fact that the United States is seldom united enough to be willing to entrust complete control of foreign policy to one man, or even to a simple majority. The issues that inflame the Pacific Coast may leave the Atlantic Coast cold and produce nothing more impressive than irritated boredom in the Middle West. And, until recent times, the United States could *afford* the luxury of a crippled and sectional foreign policy, as British dominions could afford to have no

foreign policy at all. Apparently immune from external dangers, it was natural that the delights and utility of a coherent and responsible policy should not have seemed worth the possible price of internal disunion. Those happy days are past, but they have left a legacy of political habits that have survived their utility.

Not many parts of the formal constitutional machinery are totally obsolete, though many are distorted almost out of recognition. But one stone of the builders has been completely rejected. Failing to foresee the nationalizing force of party and fearful of demagogy, the founding fathers provided that the President should be indirectly elected. Each state should choose (as it thought best) an electoral college equal in number to the sum of its Senators and Representatives.[1] These colleges would choose presidential candidates, and if, as was thought likely, no one candidate got a majority, the House of Representatives should choose from the first three—each state casting only one vote. In this way the large states would, in effect, draw up a short list from which the small states would choose. This ingenious machine has never worked. Only once (in 1824) has the House been called on to choose. Party discipline has seen to it that presidential electors vote only for the candidate of the

[1] As each state must have two Senators and cannot have less than one Representative, this rule means that very small states are slightly over-represented.

party that nominated them, and apart from a slight distortion due to the over-representation of the very small states, the President is chosen by a plebiscite which fairly represents the weight of support he has won in each state.

In each state; there lies the possibility of a more serious distortion. States could and some states did allow for their vote being cast in proportion to the strength of the candidates, but a state which thus respected the rights of minorities lost power, since it was less to be feared than a state which cast all its vote for one candidate. To-day, a candidate who carries New York, by however narrow a margin, wins all the forty-seven votes of that state and forty-seven votes out of the two hundred and sixty-five which makes a majority of the 'Electoral College' is a great prize. It may happen—and it has happened once[1]—that a candidate carrying his states by large majorities can be defeated by a candidate carrying his states by narrow majorities, although, taken together, the majorities and minorities of the first candidate showed that he was the choice of the American people.

A consequence of this is that presidential candidates

[1] In 1888, Grover Cleveland, running for re-election, was defeated, although he had a majority of the popular vote, because the Republicans carried narrowly—and, it was thought, corruptly—New York and Indiana. In 1916, Wilson running for re-election had a reasonably impressive popular majority by the standards of those times, but was, in fact, elected because he carried California by a few hundred votes.

tend to be taken from large and doubtful states: from large states since their votes are worth having, from doubtful states since safe states do not need to be won by the flattery of the nomination of a favourite son. So the most able potential candidate who is resident in a small or certain state is excluded from the list of 'available' candidates.[1] This rule has only once been broken in modern times, when the Republicans in 1936 nominated Governor Landon of Kansas. Kansas had only nine electoral votes and was one of the safest of Republican states. But Mr Landon only carried two states, neither of them Kansas, so that the authority of the rule was strengthened.

Openly to admit that the real constituency of a presidential candidate is the United States and to elect the President on a national poll would make good candidates 'available', would do away with the risk of electing a minority candidate and further nationalize politics. The argument that such a change would destroy the independent position of the states and

[1] As congressional leaders usually come from safe states, they make poor presidential candidates. The Democrats have never nominated a candidate from the 'Solid South' since it became solid and the Republicans have never nominated a candidate from what was their safest great state, Pennsylvania. On the other hand, New York has always been doubtful in presidential elections and, since the end of the Civil War, one of the candidates of the two major parties has been a New Yorker in fourteen elections out of nineteen. (In 1912 I have counted Theodore Roosevelt as the candidate of a major party, as he ran far ahead of President Taft, the regular Republican candidate.)

would make possible the imposition of a candidate from the populous North-east on the whole nation, is not impressive. The President does not consider himself, once elected, the special representative of his state, and the present system does not prevent the election of a highly sectional candidate. Indeed, in the most momentous of all presidential elections, that of 1860, Lincoln was elected although he did not carry a single southern or border state and although he polled a great deal less than half of the popular vote. And even had the votes scattered over Douglas, Breckenridge and Bell been concentrated on one of them, Lincoln would still have been elected, as his narrow northern majorities gave him the full vote of great states like New York and Pennsylvania. A national poll would, at any rate, make the catastrophe of the election of a sectional minority candidate impossible. And as the system designed to elect the President broke down from the beginning, it is a misguided antiquarianism that clings to machinery that survives only as a possible source of mischief.

In justice to the founding fathers, it must be said that they did not wholly misapprehend the situation. The true heir of the 'Electoral College' they planned, is the National Convention of one of the national parties. It is in the negotiations and bargains of these bodies that the difficulty of finding a real or imitation national figure to run for President is got over. It *is* difficult, for except in the case of the President in

office, the 'available' candidates are very seldom national figures when nominated. And it is a sign of American political sagacity that the 'presidential primary' has never taken real root.[1] These party elections merely tell the delegates what the local electors think of the presidential field in the spring. But the Conventions meet in the summer when circumstances may have completely changed. Like prudent backers, the American people refuse to indulge in ante-post betting. The result of the Convention is often the nomination of a dark horse and the American political classic is too often won by a mediocre party hack, rather than by a political equivalent of Man o' War.

Yet even the darkest of dark horses, once President, is secure in his main prerogatives. The power of the Constitution to limit the ravages of a revolution were never better displayed than in the failure of the impeachment of President Johnson in 1868. It is hard to think of a President whose position was intrinsically weaker. He had been made 'Union', i.e. Republican, Vice-presidential candidate in 1864 (although he was a Democrat) in order to help the re-election of Lincoln. Although sound on the Union, he was a Southern poor white with many of the prejudices and with all the political handicaps involved in that origin when complete victory came to the North. Lincoln's murder made him President, head of the Republican party and inevitably threw him into violent conflict with the

Cf. p. 43.

majority of the party which had just won a great civil war and which was developing the revolutionary implications of the victory. Johnson was in no sense the choice of the American people; it was easy to pass bills over his veto; to tie his hands by special legislation; to reduce presidential authority to a minimum; but there *was* a minimum below which it could not be reduced; there were indispensable prerogatives which could not be taken from the President. The only remedy left to the triumphant majority was to impeach the President, but it was impossible to find a two-thirds majority in a bitterly Republican Senate to declare that Andrew Johnson had committed 'high crimes and misdemeanours'—and no matter how distasteful or how odious the President's actions were, Congress could not remove him or coerce him. The paper bonds of the Constitution held and ensured that no President, however weak, would be reduced by any Congress, however strong, to the level of a Peshwa of the Mahrattas or a British King who reigns but does not rule.

The role of the President is only defined in the vaguest terms in the fundamental law. 'The vagueness of the constitutional grants of power to the President has always furnished matter for comment, sometimes favorable, sometimes otherwise, depending on the commentator's bias.'[1] Meaning has been given to vague terms like 'the executive power' by the action of Presidents, more than by legislation or court decision.

[1] E. S. Corwin, *The President: Office and Powers*, p. 309.

Indeed, the Supreme Court by its doctrine of 'political cases' has kept its hands off presidential use of the prerogative.[1] The maker of the presidency, as the centre of American political loyalties and interest, was Andrew Jackson (1829–1837), who stressed its character as *the* national institution; the President was the choice and representative of the whole people. And in emergencies it is to the President and not to Congress that the sovereign people turns; in him is their power and will incarnate.

The President exercises all his powers freely; there are no conventions depriving him, in fact, of powers that he has by law. Thus, whatever may have been the original theory of the presidential veto, it is now exercised not merely to protect the Constitution or the presidential prerogative, but to express the President's own opinion—and he has a right to that opinion as long as he is in office; he can thwart, without any sense of guilt the opinion of Congress—as long as Congress cannot muster a two-thirds majority to overrule his veto. In taking his oath to 'preserve, protect and defend the Constitution of the United States', the President is less binding himself to observe constitutional limitations on his powers, than answering, with a decided affirmative, the charge given him by the American people, as it was given to the Consuls by the Roman people, to see that 'no ill befalls the commonwealth'. This Jacksonian doctrine was acted on by

[1] Cf. p 101

Lincoln, who used the specific grant of powers as Commander-in-Chief to do much that Congress should and could have done.[1] This doctrine of a presidential prerogative on which, in an emergency, a President can draw, is accepted by the American people. The two Presidents under whom presidential authority has since reached its greatest heights, Woodrow Wilson and F. D. Roosevelt, have both preferred to get statutory authority from Congress, but they also acted without it—and in any case, the significant point is the acceptance by the people and by Congress of the doctrine that in an emergency it is the President who must be given powers to act. The fathers of the Constitution may have intended to make the President a much-reduced version of George III, of a Stadtholder for a limited term of years, but they created an office in which the possibilities of growth in power and dignity were unequalled by any organ of the new system.

This is not the only department of the federal government which has, for better or worse, developed on lines which we may assume were unanticipated by the framers of the Constitution. The Senate was designed to be a kind of privy council round the President—and it has not been that since Washington's time. And it

[1] 'Some of his important measures were taken under the consciousness that they belonged within the domain of Congress. The national legislature was merely permitted to ratify these measures, or else to adopt the futile alternative of refusing consent to an accomplished fact': J. G. Randall, *Constitutional Problems under Lincoln*, p. 514.

was not designed to dominate the House of Representatives—as it has done for over a century. War and crisis, economic development, improvement in transport, the growth of a straggling community of three or four million people on the Atlantic edge into a great nation of one hundred and thirty millions, spread from coast to coast; all have produced profound changes in the brief, simple, unambitious and fortunately often ambiguous document that went into effect in 1789. The skeleton that the makers of the Constitution created has been overlaid with more muscle and some fat, but the skeleton is still there; its fractures healed; its bones strong. It is the greatest achievement in political planning the modern world has known, and it has been such an achievement because the planners did not plan too much or deny to the future the possibility of growth and so of change.

CHAPTER II

THE PARTIES

I

'Some politicians are Republican, some Democratic,
And their feud is dramatic,
But except for the name
They are identically the same.'

OGDEN NASH.

THE FATHERS of the American Constitution were impressed, like all their generation, with the dangers to popular government involved in the existence of party feeling and party organization or, as the most acute political thinker among them put it, in 'the violence of faction'. But James Madison was too wise to believe that party could be abolished (except by the abolition of political liberty), and too impressed by the power of self-interest and passion to believe that there was any hope of establishing a republic wherein none should be for the party and all for the state.

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is

not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of society into different interests and parties.[1]

In this famous passage, Madison prophetically described the main character of American political parties. Madison, of course, was not naïve enough to think that politics were nakedly about property.

A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity and rendered them much more disposed to vex and oppress than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are

[1] *The Federalist*, No. x.

creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government.[1]

This classical statement of the relationship between party and economic interest has been accepted in modern times, by most historians, as the main clue to American party history. Party politics in the United States have been, in the main, about the political aspects of the economic development of the country. The old picture of American party history as a conflict between nationalist and states-rights views, between Hamiltonians and Jeffersonians, about the due limits of federal and state authority, is left to the historical fundamentalists. Jefferson, in office, was a far less rigorous defender of the limited doctrine of federal authority than was Jefferson in opposition, and the most dramatic extension of federal authority, the purchase of Louisiana from Napoleon,[2] was his doing. And the supporters of federal power when it was in their hands, were highly critical of its extension when

[1] *Ibid.*

[2] Not merely the modern state of that name, but a far vaster territory covering about a third of the present area of the United States.

it was in the hands of others. This was not the mere extension to America of the doctrine that the business of an opposition was to oppose. The addition of Louisiana to the Union, the creation of new states from this new territory, upset the balance of power between the sections, between the states of New England with their own social and economic differences and interests and those of the South and West, as the vigilant defenders of the old order saw.

They knew the nature of man and the effect of his combinations in political societies. They knew that when the weight of particular sections of a confederacy was greatly unequal, the resulting power would be abused.[1]

'The weight of particular sections of a confederacy'; these sections, not the states, were the real partners to the Union, the more as new states, with no historical roots, were added to the Union. The sections, New England, the Middle States, the South, the Old Northwest, were not, of course, uniform in sentiments or in interests; there were considerable variations within their boundaries. But American politics had more resemblance to the diplomacy of the balance of power than to British politics. Sections that were undisciplined, or badly united, suffered as did the Holy Roman Empire in contests with unified nations like France.

[1] Josiah Quincy of Massachusetts, opposing the admission of Louisiana as a state (1811): *The Life of Josiah Quincy*, by Edmund Quincy, p. 209.

Each section wished to control federal power, and when that dream was recognized as hopeless, to limit it. It was natural that Calhoun should be a strong defender of federal power as long as South Carolina thought she could gain by it; it was natural that Daniel Webster should oppose a strengthening of federal power whose results in war and ruin had driven New England to the verge of secession during the War of 1812. And it was natural that as times changed, men should change with them, that Calhoun should become the fanatical defender of states' rights, the last infirmity of feeble sections, and that Webster should become the spokesman of that Union on whose survival the prosperity of the 'Cotton Whigs' of Massachusetts depended.

The connection of politics with economic interest was as direct, but less simple than Madison had described it. Legal owner of vast undeveloped assets, the government of the United States was in itself a great economic prize. The methods whereby these assets were to be used or distributed, the groups which would gain by this policy or that; these were permanent issues. So were the directions that might be given to general economic policy by tariff and banking laws and by the use of federal resources to develop, more rapidly than private enterprise would do, the internal transport system, the key to individual and regional fortune. So American politics were largely about land policy; should the public lands be sold or given away? If they

were to be sold should they be sold on terms that would encourage a general distribution of landed property or accumulations of it? Was a high tariff, encouraging industry to the profit of regions like New England that had no other source of wealth, an outrage on regions like the South that had few hopes of manufacturing wealth but a practical monopoly of the most important manufacturing raw material in the world, cotton? Should banking laws encourage centralization of monetary control and, when necessary, impose rigorous deflation in the name of sound money? None of these problems were purely sectional; there were, in every state, individuals and groups whose interests—or supposed interests—cut them off from the majority interests of their state and section. No state and no section was quite uniform in its economic geography. But in the main, the connection between political and economic policy was seen in one light by each of the great regions; but as there was more than one element in the economic needs of each region, politics became a game of permutations and combinations. In the periods when these sectional disputes became most acrimonious and obvious and when American politics were going through reorganization, the task of the political strategist was especially difficult. In 1828,

the struggles of sections were centering about these three economic issues—tariff, public lands, and internal improvements. The interest of the different sections in these issues, in the order of their importance

was as follows: the Northwest—low-priced public lands, internal improvements, a high tariff; the Southwest—low-priced public lands, a low tariff, internal improvements; the seaboard South—a low tariff, no internal improvements at federal expense, high-priced public lands; the North Atlantic States—a high tariff, high-priced public lands, internal improvements.[1]

The political solution of this problem in organizing a national alliance of sections and classes, was the Jacksonian Democratic party, based in the main on the South and West, on the smaller farmers and on the town workers. This combination governed American politics, until the clash between the Southern slave states, whose economic policy was now dominated by the planter interest, and the Western farmers and Northern workers became too bitter to be compromised. It was a conflict fought at more than one level, but at one level it was a contest over the fear, the justified fear, that whatever use was made of the economic resources and power of the Union, it would not be used for the benefit of the South Atlantic states. So these states resolved, in effect, that this power should not be used at all and that the political power of the Union should be used to give to the slavery system a security and power of expansion that the whole United States (outside the South) was resolved it should not have. If the South had had its way, almost the only federal activity in the vast undeveloped federal

[1] R. G. Wellington, *The Political and Sectional Influence of the Public Lands*, 1828–1842, p. 9.

domain would have been the protection of nascent slavery. It was a fantastically unrealistic policy. It showed its true character in the Democratic party convention of 1860, when the South rejected Stephen A. Douglas, the only Democratic candidate who could possibly have won—rejected him because he would not and could not meet their demands; he could not make the American sun stand still. As a Douglas leader told the maddened Southern delegates: 'Gentlemen of the South, you mistake us—you mistake us—we will not do it.' Nor even had they been willing, could they.[1] It was the failure of the Democratic party to stay united that made the Civil War inevitable. When the political machine broke down, when its operators were no longer able to keep conflict at a level on which the defeated section still respected the formal law, war resulted.

The victor in the war was not merely the United States but the Republican party. Like all successful parties it was a sectional alliance. It united the growing manufacturing interest of the East with the farmers of the West. It gave the first a high tariff; it gave the second free land; it gave both federal gifts and credit for the rapid development of a railway system that made obsolete the old water-borne system of Missis-

[1] There were many Northern delegates hostile to Douglas, and some Southern delegates in his favour, but the sectional issue was plain underneath the veils thrown over the realities by the politicians.

sippi trade and thus left the conquered South in an economic as well as a political corner. But the victory of the Republicans accentuated the sectional character of American politics. It created a sectional barrier that no party managed, until very modern times, to jump. The South was made 'solid'; that is, it always voted the Democratic ticket. The rural North was also made solid; it always voted the Republican ticket. Over a great part of America, discontent with the current political set-up could only be expressed within one party. An opposition party in Vermont and in Virginia did not exist, except as a minor political convenience.

Of course, the result of the Civil War was not confined to mere political reorganization. The limits of legal control of political realities were exemplified in the bewilderment of conservative members of the winning party. The war, they thought, had been fought to decide whether a state could leave the Union and whether a nation could exist half-slave and half-free. An acute politician like Lincoln's Secretary of the Navy, Gideon Welles, never seems to have understood that far more than that had been decided, that a federal government that raised armies of millions of men, that ruled by the sword great states and cities, that spent thousands of millions of dollars, could not be reduced to the limited duties and limited authority of the feeble, intermittent federal government of 1860 that raised no direct taxes, that lived on customs duties, that hardly touched the individual citizen at all, and

that had had to strain its military resources to impose a semblance of obedience on the Mormons. Grant, Sherman, Sheridan, these had as effectively altered the constitutional balance as had any Chief Justice. Chase as Secretary of the Treasury, creating the system of national banks and issuing an immense mass of paper currency, introducing income-tax and so making necessary a new class of federal office-holders, was at least as much a maker of the new political order as he was later to be as Chief Justice, trying vainly to undo some of the things he had done.[1]

The Republican party that dominated the United States from the Civil War to modern times was an alliance of the industrial East with the farming West. It was an uneasy alliance, for the bargain was more to the advantage of the East than of the West. But the survival of the alliance showed one aspect of American politics that irritated and still irritates the too systematically minded, the extraordinary influence of political habit. Once (at most) in every two generations, the American people are prepared to notice that the inherited party structure has broken down, but until they do that, voters keep on voting for a party name, for dead heroes like Abraham Lincoln and Stephen Douglas, Jefferson Davis and Parson Brownlow. Northern Illinois farmers voted for Lincoln, Northern Tennessee farmers for Brownlow, Southern Illinois farmers for Douglas, Southern Tennessee farmers for

[1] Cf. p. 109.

Davis, long after these symbolic figures had any real relevance to the political situation. This habit of voting for a party name was exploited with great ingenuity by the Republican politicians, who found that a revival of the emotions of the Civil War distracted the attention of the Western farmer from his grievances against the high tariffs that were so profitable to the Eastern paymasters of the politicians. 'Waving the bloody shirt' was as profitable to the American as 'clericalism, there is the enemy' was to the French politician. For seventy-two years, from 1860 to 1932, the Republicans held the presidency for all but sixteen, and during all that period, the political power of the Union was used to promote the interests of the great business combines that supported 'the party of moral ideas'. But that party could not have delivered the goods if it had not had the prestige of having once been the party of moral ideas. Nor is this all. Slowly, reluctantly, but inevitably, the Republicans had to make concessions. Within the nominal party lines, Western dissidents formed temporary alliances with the Democrats, with such short-lived radical parties as the Populists, and federal power was used to curb as well as to foster the free development of the great trusts.

The very artificiality of the party lines and the existence of the separation of powers made the control of the Union by the East less complete than it seemed on paper. Sectionalism in both Houses of Congress brought about the creation of 'blocks' which had to be

bought off and made possible the careers of politicians like the late Senator Borah, who only remembered that he was a good Republican in election years. Below the two-party system, there existed a sectional system, and in the last years of the old political order, the clash between city and country inside both parties, between the Protestant and Puritan rural population and the indifferent or Catholic urban population, ruined the discipline of both parties, turning Virginia Republican and Massachusetts Democratic. When the crash of 1929 came, it was expiated by the party in power, the Republicans. A ruined farmer, threatened with legal expropriation, was in no mood to hear again of the glories of Lincoln and the old party system received a blow from which it has not yet recovered.

Yet the party system of 1941 is still sectional. Profoundly conservative Southern Senators like 'Cotton Ed' Smith still call themselves Democrats, as does the 'man in the White House' who has, they think, put bootleg alcohol into the old bottle. In the considerable revival of Republican fortunes that marked 1938 and 1940, the rural regions have been the first to return to their old allegiance. The old habit of traditional voting has not altogether died.

If by national parties, we mean parties with the same doctrines in all parts of a country, attempting to carry out a programme in the interests of a group or groups pretty evenly distributed throughout the nation, the United States has no national parties and never has

had. The simple line-up of haves and have-nots anticipated by Madison has not appeared because differences in immediate interests, supported by differences in inherited sentiments, have cut across this, as across most formal party divisions. Politics in Europe have been largely about politics, about the form of government, about religion in the schools or church establishment or foreign policy or suppressed nationalities or the like. For a century past, American politics have lacked this kind of material, except at rare and critical moments. But for the national parties, there would have been a constant strain on the forces of union as each section fought for its own hand. And each section would have fought for its own hand, made party lines temporary and wanting in emotionally binding force, had it not been for the necessity imposed on them by the presidential system of uniting to elect one man, not a team, as the executive of the Union.

In the National Conventions that nominate the presidential candidates, the sectional conflicts are open and bitter. A candidate is the choice of a sectional alliance, like that combination of West and South that imposed Bryan in 1896, Wilson in 1912 and Roosevelt in 1932 on the Democratic party. But once chosen, the candidate draws with surprising success on party loyalty and the most discordant elements are united in the common endeavour to 'win the election'. And winning the election is always winning the presidency. Emotionally and practically, the presidency is the great unifying

force of American politics, and that it can be so is due to the existence of national parties. And those parties only remain 'national' by tolerating a diversity of doctrine and practice, reminding one more of the Church of England than of the parties Europe knows.

There is another aspect of the irrational, doctrinally absurd party system that has its claims on American gratitude. The national parties have been nationalizing forces of great importance by their attitude to the immigrants who poured in in their millions all through the nineteenth and early twentieth centuries. Because there were national parties with no fixed principles, the immigrants were not forced or tempted, except at rare intervals and in some places, to keep outside the regular political life of their adopted country. As soon as they had a legal right to vote, indeed in old lax days long before they had such a right, they were valuable political assets, to be humoured, even to be aided. Parties (with one exception) drew no permanent lines;[1] they made the equality promised by Fourth of July speakers more of a reality than industry or social life

[1] The exception was the Negroes. They were traditionally the protégés of the Republicans who had freed them. In the solid Democratic 'Solid South' they were debarred from voting. But in the North where they could vote, Democratic politicians in cities like New York cultivated them, to the disgust of their fellow-Democrats from the South. And sign of the times, the only Negro in Congress is a Chicago Democratic Representative. There is reason to believe that the American Negro, poor and 'under-privileged', thinks that he has paid his debt to the heirs and assigns of Lincoln.

did. What severe critics called 'pandering' to racial groups was one of the most useful nationalizing activities of the parties and the chief contribution of 'machines' like Tammany Hall to the 'more perfect union' which was the great political need of the fast growing American nation.

Before the Civil War, immigrants in general joined the Democratic party, partly because of the name, partly because its rivals, the Whigs and, later, the Republicans, were rightly suspected of anti-foreign prejudices. The slavery crisis led many of the German and other immigrants to join the ranks of the Republicans, but most of the Irish, and a large proportion of the Germans, Dutch and the rest, remained Democrats. Over a great part of the Middle West, only 'foreigners' and persons of Southern origin remained in the Democratic party. That meant that the strength of the minority party was in the cities and in the parts of states like Ohio, Indiana, Illinois which had been settled from the South. Racial loyalty sometimes affected political allegiance. Thus of an important group of Dutch settlers in Iowa who were normally Republican, it was said that 'they have not cared to draw party lines too closely when a Dutch Democrat and an American Republican were candidates for the same county office'.[1]

Where the immigrant population was not numerically dominant, or was deeply divided by race and

[1] J. Van de Zee, *The Hollanders of Iowa*, p. 241.

religion, the immigrants took the political colour of the regions in which they settled. Some local leader might be a strong enough personality to divert the current a little, but in the main, immigrants settling in a Republican state entered that party, while in Democratic cities (there were few immigrants in traditionally Democratic states) they entered the ranks of the 'unterrified Democracy'. Where the immigrants were so numerous and homogeneous as to give a state or region its political character, things were not so simple. It was no accident that Minnesota and the Dakotas, settled in the years when the wheat farmer had many legitimate grievances against the settled order of things as represented by the railroads, the banks—and the old parties should be centres of permanent political dissidence. They are overwhelmingly Scandinavian and the comparative success of the Farmer-Labor party in Minnesota and of the 'Non-Partisan League' in North Dakota can be explained not merely in terms of the economic sorrows of those regions, but in the comparative weakness of the emotional attachment of the Scandinavian population to the old parties. Even in less racially and economically homogeneous states than these, it has made a substantial difference to political evolution that economic and racial lines have largely run parallel.[1]

[1] In New York City, economic differences are accentuated by racial differences in the case of the Jews, who are, in general, more 'radical' than Italians or other recent immigrants of the same economic level. 'The chief Socialist centers in New York—the upper and lower East side ,the south Bronx and the Williams-

This is well illustrated by the nearest eastern neighbour of Minnesota, Wisconsin.

This state is traditionally the most German and 'progressive' in the Union. It has been predominantly Republican since the days of Carl Schurz and has also had in the very German city of Milwaukee one of the two great American centres of old-fashioned German Social-Democracy. Indeed, in forward-looking circles it was Victor Berger's *Milwaukee Leader*, rather than Schlitz's beer, that made the city famous. Inside the Republican party, a long fight for the control of the machinery ended in the victory of the progressive element led by Robert Marion La Follette. As Governor, and then as Senator, he dominated the state, remaining inside the Republican party until he left it to run as Progressive candidate for President in 1924.[1] The Progressive party did not survive the defeat of 1924 and it was as the victor in the Republican primaries that Robert M. La Follette Jr. (hereinafter known as 'Young Bob'), his brother Philip and other adherents to the dynasty were repeatedly elected to office in state and nation. The Democratic party survived only as a skeleton organization, except in the urban areas along the shores of Lake Michigan. The

burg district in Brooklyn—are almost exclusively Jewish': P. H. Odegard and E. A. Helms, *American Politics*, p. 244. But the majority of New York Jews, like the vast majority of all New Yorkers, vote for the old parties.

[1] The Vice-Presidential candidate was the junior Democratic Senator from Montana, Mr Burton K. Wheeler.

real fight was between the richer and more conservative elements of the Republican party and the poorer and more progressive elements. But the richer and more conservative elements were not only that; they were, in origin, mainly 'American' and German, while the progressive elements were not merely poorer, but in the main of more recent immigrant, especially Scandinavian stock. And if most Germans in the state were Republicans of some shade or other, most Catholics were Democrats—and many Germans were Catholics.

The political revolution of 1932 was general in Wisconsin as in the whole nation. One consequence was the defeat of the junior progressive Senator in the Republican primary by a conservative Republican who, in turn, was ignominiously defeated in the final election by the Democratic candidate (whose name was Francis Ryan Duffy). The resurrection of the Democratic party made the position of the La Follette Republicans difficult, since they were likely to be a minority in the Republican party which was losing many of its poorer and more progressive elements to the New Deal Democrats. But the position of the La Follettes was still strong, so that it was dangerous for the Democrats to ignore the dynasty altogether. Keeping out of state politics, the President endorsed the senatorial candidacy of Senator La Follette[1] but did not endorse the

[1] A prominent Left-minded Democratic politician in the state told the writer before the President endorsed Senator La Follette, 'He'll come out for Bob; anyway, most of our people will vote for him whether F. D. R. does or not'.

candidacy of ex-Governor Philip La Follette. But the re-born Progressive party won handsomely, too handsomely, perhaps, for the triumph of 1934 may have given the ruling family delusions of grandeur. For the event was to prove that Wisconsin was not an isolated island of political rationality in the illogical sea of American politics. It went for Mr Roosevelt and the New Deal of 1936, but two years later, the renewed depression alienated the prosperous, and so conservative Democrats voted for the conservative Republican, Mr Julius Heil. But the reaction was not solely the result of the recession in business and the general shift against 'New Dealism' that marked 1938 all over the Union. It was in part due to movements within the population of Wisconsin, which showed that, despite the formal role of that state as a model of rational party politics, the racial, religious, sectional forces that worked obviously in other states were at work, less obviously, in Wisconsin too. The nucleus of the Progressive party strength is in counties which are poor but which are also Scandinavian, Protestant, and 'dry'. 'The backbone of Wisconsin progressivism of the last decade was, then, the poor Protestant farmers badly hit by the events of the depression.'[1] Yet farmers badly hit by the depression but of 'American' or old immigrant stock, German or Irish, on the whole expressed their

[1] Harold F. Gosnell and Morris H. Cohen, 'Progressive Politics: Wisconsin an Example', *The American Political Science Review*, October 1940, p. 933.

political views within the old parties, refusing to follow the La Follette family in and out of the Republican party. And the urban population (which was largely Catholic) was far more loyal to the Democratic party, even in its dark days, than any merely rational calculation would make likely. Racial origin, religion, the political tradition of an area, all play a great part in distorting the natural alignment on economic or even general political lines.

The degree to which politics acted as an Americanizing force, as a solution, however limited, of the problems presented by immigration, depended on local conditions. Where the immigrants are too weak to be worth conciliating or just numerous enough to be a 'nuisance' without being a 'menace', movements like the Ku Klux Klan may flourish in which politics become definitely a force for increasing racial hostility. Thus had 'Middletown' had a larger foreign-born population, the Klan might not have flourished at all, or so long. On the other hand, where the 'non-American' population is numerically dominant, its political power may be a source of great irritation to the 'American' minority, especially since that minority's weak political position will probably be in marked contrast to its strong economic and social position. Thus in Holyoke, Massachusetts,

the United States census report of 1890 revealed the overwhelming preponderance of Catholics in the community, 18,828 Catholics to 3128 church members of

all other churches.... The gradual supplanting of Protestant teachers in the public schools by Catholics was declared by irritated non-Catholics to be the result of religious prejudice. The large majority over a Protestant rival which a staunch Catholic might expect to score in any municipal election if he skilfully played upon the intolerance of his co-religionists offered a temptation to the not too nice that was hard to resist.[1]

The impact of the depression has again weakened the unifying force of politics. As long as politics were about nothing in particular, the machines were drawing together very different social and economic groups. The chain between a 'Main Line' Philadelphian of aristocratic Quaker origin and political ambitions and the Irish ward politician along the water front was long, but every link in it had to hold, if the Republican party was to remain in secure control of the assets of the city, state and even of the nation. The same held true of the role of Tammany in Democratic politics. But as politics have become serious, as class lines have cut across party lines, and as the machines have been forced to make at any rate a profession of social views or see (as has happened with Tammany) their clientele

[1] C. M. Green, *Holyoke: Massachusetts*, p. 346. The teacher grievance was made more serious here and elsewhere by the success of the church authorities in establishing a system of parochial schools; the more successful this policy was, the more completely all Catholic children were taught by Catholics alone —and where the public schools were controlled in the fashion described above, to a great degree so were the non-Catholic children.

desert them, the professional politician has no longer the same utility as a nationalizing force.

The break-down of the old party lines, the increased identification of class with party, has weakened some old political habits of racial groups. In Burlington (Vermont), the Irish Democrats in recent years have gradually won over to the Democratic ranks many of the French Canadians who in the early days used to vote Republican chiefly because their Old American employers told them to do so, but who, as one Old American admitted, if left to themselves, would all be Democrats. Thus to-day the allegiance to political party which at one time combined French Canadian and Yankee against Irishman, is now more and more an alignment of newer versus older Americans.[1]

As the New Deal has alienated more and more of the possessing classes from the Democratic party (which, in any case, only attracted a minority of those classes outside the South), party lines have tended to follow race lines. The older stocks, in general, represent the more prosperous elements, so that a political alignment based on economic differences tends to become nearly identical with a political alignment based on race differences. Thus politics lose some of their old power of uniting different racial groups. In the depression the greatest suffering was endured by the new-comers and the sense of being considered inferior, so prevalent among all foreign nationality groups, in the case of the

[1] E. L. Anderson, *We Americans. A Study of Cleavage in an American City*, p. 212.

unemployed quickly translates itself into interpreting any curtailment of relief or any mistake in administration as a deliberate discrimination against a specific nationality.[1]

Those activities of the old machines which produced, at a low level, a sense of common interest, may in modern times, at a much higher level of efficiency and honesty, produce a sense of difference. '"In our community", was one remark, "there are only two groups, Americans and Hunkies, and there is no connection between them".'[2]

II

The complete control of the political assets of great regions by one or other of the two national parties justifies the extraordinary lengths to which the states and the Union have gone in regulating party machinery. Confronted with a condition not a theory, with a situation in which the candidate who can use a given party label, Republican in Vermont, Democratic in Georgia, is sure of election, American law has tried in nearly every state to give the elector a real voice in the attribution of the party name. In all states but three, candidates are nominated by direct primaries, that is by elections conducted by the state which decide what candidates will run as 'Democrats' and what as

[1] Philip Klein (and Collaborators), *A Social Study of Pittsburgh*, p. 242.
[2] *Ibid.* p. 245.

'Republicans'. In many states that is all that matters; the formal election is as empty a ceremony as the election of an English bishop after the receipt of the royal *congé d'élire*. The time, the place, the manner of the primary; the nature of the party emblem; the name of the party; its formal constitution; all are regulated by law. There are few limitations in law and custom on the extent of legal control of such formally private organizations as the parties.[1]

This legal regulation of parties of course stereotypes the present party alignment. In the first place it makes tolerable the artificial character of the national party system. It is possible that if there were not the safety valve of the primary system, there would be a revolt even in Maine, even in Mississippi, against the single-party monopoly. Possible but not likely. But it is true that the party that cannot run its own primary is at a great disadvantage. And state law, as a rule, makes it difficult for a minor party to qualify to have a primary or to intrude on the jousting ground where the two accredited champions perform. But it can be said in defence of the primary system that it does make possible real local political contests within the national

[1] 'The limitation upon legislative power appears to be only that it may not go so far as completely to prohibit the making of nominations; for such an attempt would constitute an arbitrary interference with the liberty of the people to associate themselves together for the purpose of expressing their choice for public officers': J. R. Starr, 'The Legal Status of American Political Parties', *American Political Science Review*, June 1940.

parties, without making the existence of national political parties too difficult—and the two-party system, for all its intellectual offensiveness, is one of the great nationalizing forces. A breakdown of the system would be less likely to produce two 'real' national parties than a congeries of sectional parties, some of which would not even pretend to be national. That this is true is indicated by the fact that the existing minority parties are either entirely negligible as the Communist 'splinter' parties have become or are only powerful in clearly delimited areas; the orthodox Communists in New York City; the orthodox Socialists in Milwaukee; the Progressives in Wisconsin; the Farmer-Labor party in Minnesota; the Non-partisan League in North Dakota. And the forces that make these parties strong in given regions are not merely sectional but racial. From the point of view of national unity, there are grave dangers in that 'rationalization' of the party structure to which the legal regulation and entrenchment of the two old parties is certainly one of the obstacles.

One consequence of the direct primary is deplored by the party manager and makes the effective unity of the national parties still more difficult of achievement. A local party leader may be strong with the rank and file of party voters and yet be at odds with the national party organization. A state may vote enthusiastically for a presidential candidate who is on the worst of terms with a Senator for whom the state also votes.

A President may thus find on his hands a Senator or Senators whose formal party regularity is far less important than their fundamental hostility to his person or policies. Mr Roosevelt attempted, in the mid-term elections of 1938, to 'purge' some dissident Senators but without success. Party loyalty to the Roosevelt administration was compatible in the eyes of Democratic voters in Georgia, Indiana, Iowa, Maryland with support of Senators whose hostility to the Roosevelt administration had called forth public denunciations by the President.[1]

In a one-party state, the direct primary makes it possible for a strong local leader to maintain only the most formal relationship with the national administration, but that has its good as well as its bad side. In the old days when the party label was in the gift of the party machines, the 'bosses' of states like Pennsylvania could afford to ignore the threats or entreaties of the national organization, but the career of a really independent Senator like Mr Norris of Nebraska would have been impossible in the old days when the electors

[1] Mr Roosevelt did succeed in one 'purge'. He induced the electors of a New York City district to defeat Mr John O'Connor, Chairman of the important 'Rules Committee' of the House of Representatives, who was one of the most important Democratic leaders in Congress and who had used his power to defeat some very important administration measures. Mr O'Connor ran (with Republican support) against the President's candidate. This mix-up was complicated by the fact that Mr O'Connor's brother, Mr Basil O'Connor, was the President's law partner and is still his family lawyer.

of Nebraska would have had no effective means of expressing their repeated decision to keep their greatest citizen in the Senate, no matter what party label, or none, he chooses to wear.

In another way, the primary system weakens party discipline. A party leader may be far more popular with the regular party members than with the marginal non-party voters. A majority of members of a party may impose on the party a candidate who is, in the eyes of the whole electorate, much less suitable for high office than he is in the eyes of the party stalwarts. The electorate may then reverse the primary; that is, the defeated minority in the dominant party may, by abstention or by open 'bolting', throw the victory to the minority party. Thus in Massachusetts in 1936, although Mr Roosevelt carried the Commonwealth with ease, the Republicans elected the Senator because enough Democratic voters refused to send Governor Curley to the Senate, although this minority had not been strong enough to defeat him in the primary. The Roosevelt administration thus lost a Senate seat, where a stronger candidate (such as the party leaders might have chosen) would have kept it—and Massachusetts is again represented by a Cabot Lodge.

The American party system was not only not provided for in the Constitution; it was provided against —in vain. Its faults; its irrationality; its excessive devotion to historical precedent; its encouragement of what Burke called 'a confused and scuffling bustle of

local agency';[1] all ask for and receive the contempt of the enlightened. But it has held together a vast area and a heterogeneous people, held them together better than a more rigid and symmetrical system would have done. It has not killed sectionalism, but it did not create it and it may be doubted if, in so vast a country, a killing of sectionalism is an unmixed good to be aimed at.[2] If we compare American parties not with English parties, but with bodies like the First and Second Internationals, we see them in a better perspective and realize how highly integrated they are—and if we compare them with the Third International, we see how successful they are. The American people may not be conscious of it, but the last time a major party was broken up because a section of it insisted on clarity and consistency was in 1860, when the Southern Democrats refused to accept Stephen Douglas and an ambiguous platform. They had their way; the party was split. And the great doctrinaire of the party and the South rejoiced with the Charleston mob. '"Per-

[1] Quoted by Lindsay Rogers, *The American Senate*, p. 102.

[2] 'One can only wonder whether the British Empire would be confronted with the problem of Ireland to-day if Parliament had been a forum in which sectional interests had greater sway instead of one in which the national parties dominated the proceedings. Although the American system did not prevent the Civil War, it is perhaps worth speculating as to whether that war might not have broken out sooner, with the consequent destruction of the Union, if sectional interests had been less represented in the legislative process than they actually were': Schuyler C. Wallace, in *The American Political Science Review*, December 1940, p. 1199.

haps even now", Yancey tells them, "the pen of the historian is nibbed to write the story of a new revolution".'[1] It was, and in five years time Yancey's section and cause were in ruins and the United States had passed through one of the most bloody civil wars in history. It was not until the parties had split, after churches and schools, clubs and colleges had been riven by the conflict over slavery, that war came. And American parties can only stay united by toleration of diversity and reconciliation of interests and emotions which the parties do not create but which they must manage.

[1] George Fort Milton, *The Eve of Conflict*, p. 441.

CHAPTER III

THE PRESIDENT AND CONGRESS

'The President...may be both the leader of his party and the leader of the nation, or he may be one or the other. If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it.'

WOODROW WILSON, *Constitutional Government in the United States* (1908).

I

THE most striking example of the separation of powers afforded by the American Constitution is the apparently rigid separation of the executive from the legislative power. All the executive power is vested in one man, who cannot hold the office of President and be a member of Congress. Nor can the holders of any executive office under the federal government be members of Congress. The President has what is, by custom, called a 'cabinet', composed of the ten chief executive officers of the government. But he is not bound to summon it or to listen to its advice or to pay attention to its most vehement protests. 'Noes, seven, Ayes, one: the Ayes have it.' So runs the anecdote of Lincoln and his Cabinet and he was well within his legal and customary rights.

It is unnecessary to underline the differences between this and the English system where, whatever the

nature of the relationship, no matter which is master and which servant, it is undoubted that the relation between the Cabinet and the House of Commons is most intimate.

The lack of Cabinet control of parliamentary business has one obvious consequence. The private member in the House of Commons seldom feels any desire to introduce legislation. If he wins a place in the ballot, he may not have a bill ready, and among other reasons why the Government's control of parliamentary time is not profoundly resented, is the primary one that if the rank and file of M.P.'s had more time on their hands, they would not know what to do with it. But in Congress there is no such formal control by the Cabinet and, if Congressmen did not profess to try to legislate, they would find it hard to justify their pretensions to be taken seriously. They cannot ask questions; there are few interesting debates; they are not openly and formally supporting the executive in its administrative functions. They must do something and so they introduce bills. This they do on an arithmetically impressive scale.

In both sessions of the Seventy-second Congress 15,415 bills and joint resolutions came into the House, and 5,967 bills and joint resolutions into the Senate. This is not an unusual grist for the congressional mill. During the Sixty-sixth Congress 16,170 bills and joint resolutions were proposed to the House and 5,072 to the Senate; and in the Sixty-first Congress there were 33,310 bills and resolutions brought into both houses.

A certain number of these measures were companion bills. That is, the same bill was introduced in each house, but this would not account for a very large proportion of the bills introduced.

The Seventy-second Congress selected and approved 516 public acts and resolutions, and 327 private acts and resolutions; the Sixty-sixth Congress, 470 public acts and resolutions, and 124 private acts and resolutions; the Sixty-first Congress, 594 public acts and resolutions, and 288 private acts and resolutions. In the Seventy-third Congress, in 1933–34, the unusual conditions resulting from the depression were reflected in the smaller number of measures introduced. In the House there were 10,346 bills and resolutions, and in the Senate 3,950. Of these 537 became law.[1]

Politics has its Malthusian laws as well as life. The survivors are few and often arbitrarily chosen, and the spectator or baffled legislator may well feel at the sight of some survivors:

> Shame to have ousted your betters thus,
> Taking ark while the others remained outside!
> Better for all of us, froward Homunculus,
> If you'd quietly died.

Selection in the congressional battle for life is the work of the committees. Their role is indispensable, though lacking in outward show and dramatic possibilities. The organization of the business of a body of 431 members who are not drilled to support or to oppose a

[1] Joseph P. Chamberlain, *Legislative Processes National and State*, p. 7.

front bench, a body to which the head of the executive makes only occasional visits and which his executive agents cannot address at all, needs all the aid rigorous discipline can bring. 'It is very material that order, decency and regularity be preserved in a dignified public body'[1] wrote the father of congressional procedure, but Jefferson, to-day, might find that order and regularity had been purchased dearly by the House. Organized in committees covering all the main fields of government and a good many minor patches, the House of Representatives has reduced its public activities in full session to a minimum. Normally no bill and no business can be brought before the House save by the consent of the relevant committee or of the supreme 'Rules Committee' which controls procedure. Of course, the public sessions of the House with members speaking 'for the record', with one eye on the galleries and the other on the reporter who is taking down the words which, amended and expanded, will be circulated among the orator's electors, are the least important part of the business of the House. Its members have to work hard and many work competently as well, but they do not direct, or inform, or even mislead public opinion. No great legislative body is less exciting or has sacrificed more of the dramatic possibilities of politics to work than the American House of Representatives.

[1] *Constitution. Jefferson's Manual and Rules of the House of Representatives Seventy-fifth Congress*, p. 108.

In the Senate, small in numbers (96 members), with a term of six years for its most junior member to acquire the habit of ease in Zion, the problem of organizing the business of the house is less serious. Senators are almost as prolific begetters of legislation as Representatives, and they, too, need a committee system. But it cannot be said that the Senate has ignored the need for debate or the possibilities of dramatic publicity. Its rules of procedure are as lax as those of the House are rigid. A Senator who once gets the floor can keep it as long as stamina permits. He can, towards the end of a session, 'filibuster', prevent important business being done until he has his way, a dangerous device that may be used by heroes like 'Mr Smith' or by non-heroes like the late Huey Long. The Senate is an admirable sounding-board; it allows free play to the individuality of its newest members and its committees are far less able to control the business of the House than are those of the House of Representatives. But the very freedom of the Senate makes it, for positive purposes, less useful. It does not often originate a legislative policy and it cannot, of course, start or direct an administrative policy. It can and does investigate real or alleged ill-doings by means of special committees or sub-committees, and this duty it carries out with a rigour and a utility that deserve the highest praise. But investigation, oratory, and delay are not government, and when the United States wants a lead, it does not get it from the taciturn House or the loquacious Senate.

The leadership that Congress finds it so hard to provide for itself is, from time to time, provided for it by an officer who, were the separation of powers to be taken literally, ought to be keeping his hands off—the President of the United States. Since the Constitution gives him a veto power over all legislation, a veto which can only be overridden by a two-thirds majority in each House, the President is negatively a part of the legislature. But in modern times, at least, the President's role as an initiator of legislation has been more important than his role as a killer of it and, even as a killer, his formal veto has been less important than his control of the party machinery which has so often brought it about that he has had no need to exercise his constitutional power.

In quiet times, when the federal government did little, when the business of Congress was of transitory and local importance, when the long run of dull Republican Presidents reduced the practical if not symbolical importance of the office and when one House or other of Congress differed in formal party allegiance from the President more often than not,[1] it was easy to ignore the potentialities of presidential leadership, although they had been displayed in unmistakable form by that maker of the presidency, Andrew Jackson. Reed, Blaine, Conkling were congressional leaders whose power and personality might well dwarf a drab President like Hayes or an accidental one like

[1] Between 1875 and 1889 there were only two years in which both Houses were of the same party as the President.

Arthur. Yet the potentialities of presidential leadership were there. Even so great a Senator as Stephen Douglas needed the open support of so feeble a President as Franklin Pierce when he was pushing through the momentous Kansas-Nebraska bill. Even a Benjamin Harrison could shackle and irritate a Speaker Reed. And for a good reason, for as H. J. Ford put it, '"unless a measure is made an administrative issue, Congress is unable to make it a party issue"'.[1]

But as the American people has demanded more and more general legislation from Congress and as that legislation has more and more taken the character of the imposition of fresh administrative duties and the grant of fresh administrative powers, it has become inevitable that the officer who is given the duties and the powers, the President, should more and more symbolize the government of the Union and that his views as to what duties he should be given, and what powers he needs, should receive far more attentive hearing than those of members of Congress who, unless they leave that body, will have no direct say in administration. And this popular feeling is shared by Congress, at any rate in times of emergency, and 'emergency' has been the normal state of the United States for ten years now. 'Confronted with such a condition, Congress at once feels the necessity for action and its inability to plan the action needed."[2]

[1] Quoted in E. S. Corwin, *The President: Office and Powers*, p. 261.

[2] *Ibid.* p. 276.

The increasing importance of administration has been reflected in the choice of Presidents. Only one President elected in this century has ever been a member of Congress. The three most vigorous Presidents, Theodore Roosevelt, Woodrow Wilson, Franklin D. Roosevelt, were all state Governors; Taft had been Governor-General of the Philippines as well as Secretary of War; Coolidge owed his pre-presidential fame to reputed vigour as Governor of Massachusetts; and Mr Hoover had crowned a successful business and philanthropic career with an administratively brilliant record as Secretary of Commerce. The one congressional President was Harding, the weakest President since James Buchanan (1857–61), and Harding was nominated by the Republican oligarchs more to reduce the presidency to its place than to exalt the Senate of which he was one of the least important members.

The main instrument of presidential leadership in modern times is the direct appeal to public opinion. The first Roosevelt was a master of the art by the simple standards of his day, but it was Woodrow Wilson who made the fundamental change by reviving the custom of addressing Congress in person (an opportunity of influencing Congress neglected since Jefferson, in 1801, had paid homage to Republican principles, and regard to his own incompetence as a speaker, by sending only written messages). The 'special message' asking for special legislation, some-

times accompanied by the text of the bill wanted, which is then introduced into Congress by a representative of the Administration and always followed up by pressure and advice from the White House, is the effective means of impressing on Congress the role of the President as legislative leader. And that role has been made easier since a President addressing Congress is, thanks to the radio, addressing tens of millions of voters at the same time. Even Mr Roosevelt has not always had his own way in a Congress in which his party (largely thanks to his own incomparable electoral virtuosity) has always had overwhelming majorities in both Houses. There have been revolts, but there has been no revolution. Nor can there be, for Congress cannot provide the leadership itself; its role both when it says 'no' and when it says 'yes—with conditions' is important, but unless leadership comes from the White House it cannot be provided at all. Whatever the Constitution may say, or excited constitutional purists may assert that it says, the President of the United States is an extremely important part of the legislature—and at both ends of the legislative process. And this is necessary and desirable—at any rate in 'positive' epochs of American history, when the slow process of sectional adjustment does not move quickly enough for national safety. 'America needs strong government; only the President, granted its characteristics, can provide it with the leadership it requires.'[1]

[1] H. J. Laski, *The American Presidency*, p. 244.

Since a modern President is never a congressional leader, he is a newcomer on the national political stage compared with the chairmen of the ruling committees who are chairmen simply because they are veterans. The President becomes *ex officio* head of a school or club to which he has just been admitted. He may have few friends in national politics and he may never have had to work with any of the leaders whose good-will is now essential to his peace of mind, if not to his success.[1] The President can strengthen his hand by adding some congressional leaders to his Cabinet, but he need not do so. There is only one ex-member of Congress in Mr Roosevelt's present Cabinet.[2]

Leadership must come from the President, that is agreed, but it has often been pointed out that mere leadership is not enough; the leader must be followed and the links between President and Congress are, compared with those that bind a British Cabinet to the House of Commons, few and feeble.

II

The solitary character of the presidential office; the possibility that its occupant may be incapable from

[1] Mr Wendell Willkie had never met Senator McNary, Republican leader in the Senate, when they were made presidential and vice-presidential candidates in 1940. This is an extreme case, but only an extreme case.

[2] Mr Cordell Hull had been a Representative and a Senator before becoming Secretary of State.

physical, moral or intellectual weakness of meeting its demands; the certainty that his unique position makes relations with his Cabinet and Congress difficult; all lead to suggestions which, it is hoped by their authors, will diminish the isolation and spread the responsibility of the presidency. One obstacle to such schemes is the reluctance of Presidents to have anything to do with them; even the most casual, even the most indolent Presidents, the Hardings, the Coolidges, cling to the unique powers of their office with the tenacity of an absolute monarch believing in the divine right of his dynasty. Such Presidents may let their subordinates run wild or may give in to Congress to avoid conflict, but they are not willing to regularize their abdication. Any law or custom that would make of the Cabinet an independent body with its own rights and powers seems to every President what it seemed to ex-President Benjamin Harrison, 'a farming-out of his constitutional powers'.[1]

Despite the lack of presidential enthusiasm for all such schemes, the problem is a real one and the supply of theoretical solutions shows no sign of drying-up. An old proposal is to give to the members of the Cabinet the right to address either House of Congress and to answer for their departments in open session.[2]

[1] Benjamin Harrison, *The Constitution and Administration of the United States of America*, p. 70.

[2] The Constitution of the Confederate States (1861) provided that: 'Congress may, by law, grant to the principal officer in each of the Executive Departments a seat upon the floor of

There are many reasons why this system has not been adopted. But one fundamental one is its superfluity. Most important congressional business is done in committees before which Cabinet officers can and do speak, and the right to be heard before the really effective ruling committees is certainly more valuable than the right to make general rhetorical addresses before the whole House. Such a privilege would not add much to the power of an able Cabinet officer; it would not make him a real member of Congress; he would be only an occasional visitor and all that can be done by public addresses to Congress is done by the President.

A more ingenious scheme is that proposed by Professor E. S. Corwin. Starting from the fact that the Cabinet is unknown to law and constitution, Professor Corwin suggests that a President should add to a nucleus of three or four of the most important Cabinet officers, the congressional leaders, that is the chairmen of the chief committees.

The President would not become a prime minister, bound to resign when outvoted in Congress, although circumstances might arise in which he felt it his duty to do so, as Mr Wilson contemplated doing in 1916 in the event of Mr Hughes's election.... The new Cabinet

either House, with the privilege of discussing any measure appertaining to his department' (Article I: Section 6 (2)). No use was made of this provision and the difficulties of the separation of powers were more acutely illustrated by the relations of President Jefferson Davis with his Congress than by those of President Lincoln with his.

would...still be a body of advisers. But there are advisers *and* advisers. The proposed Cabinet would contain men whose daily political salt did not come from the presidential table, whose political fortunes were not involved with his, who could bring presidential whim under an independent scrutiny which to-day is lacking. It would capture and give durable form to the casual and fugitive arrangements by which Presidents have usually achieved their outstanding successes in the field of legislation.[1]

The fundamental objection to this otherwise ingenious and attractive solution is involved in two political conventions of Congress; one of them with a slight constitutional basis. The leaders of parties in a British Parliament are persons who have risen to the top in a fairly free competition in which some degree of national appeal is an indispensable asset. The leaders in Congress are persons who have risen to the top because of local popularity and authority. Every member of a British Cabinet possesses, or is supposed to possess, some claim on the national attention, as is every President of the United States. But there is no such assumption in the case of congressional leaders because of the operation of the 'locality' and 'seniority' rules. Taken together, these rules ensure that the leaders in Congress shall be persons whose basic claim to authority is popularity and power in a congressional district or in a state—and a popularity that has lasted a good many years.

[1] E. S. Corwin, *The President: Office and Powers*, p. 304.

The locality rule in itself is enough to account for the tendency to take Presidents and other political leaders, Cabinet officers and state Governors from outside the ranks of Congress. The Constitution provides that Senators and Representatives shall be residents of the *states* which they represent. Custom has made it a binding but unwritten law that Representatives must not only reside in the state but in the congressional district they wish to represent. Taken in conjunction with the complete domination of whole states and areas of states by one party, the working of the locality rule has extremely important consequences.

It means, to begin with, that a resident of a one-party district who does not belong to the dominant party is excluded from a congressional career. Thus, Mr Roosevelt could never have entered Congress as long as he remained a legal resident on his ancestral estate of Hyde Park. No Democrat could be.[1] Mr Wendell Willkie, technically leader of the Republican party, is a resident of New York City—where there is one Republican congressional seat that he might win, but he could not hope to enter the Senate from New York State for no Republican has won a Senate seat in that state for the last twenty years. And Mr Roosevelt and Mr Willkie could not run for Congress from other

[1] Mr Roosevelt served in the New York legislature and the state of New York has twice elected him governor and three times voted for him as President. It is only the congressional district that is too big and not big enough.

states or other districts. The locality rule works hardest against the New York Republicans, since in the greatest city is concentrated a large number of the ablest members of that party—and New York City and New York State are Democratic strongholds.

Not all regions are as party-bound as New York (though many are more so) but that does not better matters much. For a temporary change in party allegiance may unseat a very prominent and able politician who has to wait years for another chance at his old seat. Thus one of the leading New Deal Senators, Mr Sherman Minton, Administration whip in the Senate, lost his seat in 1940 mainly because Indiana rallied to its distinguished native son, Mr Wendell Willkie. The same rule that keeps Mr Willkie tied to the politically unprofitable soil of New York, forbids Mr Minton to try his fortune elsewhere. The locality rule introduces a new element of uncertainty into political life and a new motive for timidity. A Senator or Congressman cannot afford to defy local opinion, confident that a place will be found for him elsewhere. An Administration cannot reward a faithful adherent who loses his seat in the good cause by finding him a safe seat elsewhere. So the prudent politician 'talks for Buncombe', for only Buncombe County can send him to Congress.

Congress, then, is inevitably recruited on a sectional basis, and no amount of national eminence can provide congressional power, if the local voters or politicians

are not impressed. Naturally, the results are less unfortunate in the Senate than in the House of Representatives. States are bigger and more diversified constituencies. Mr Roosevelt could have been elected Senator for New York but not Congressman. But even states are localities and there are eminent potential Senators who never get to the Senate because they live in the wrong states.

But the effects of the locality rule are made even more serious by the working of the seniority rule. In both Houses of Congress, rank and power in the committees (and in both Houses, but especially in the lower, committee rank *is* power) go by seniority. The chairman of a committee is, in almost every case, the member of the majority party who has been longest on the committee. That has many consequences, but for our purposes only one need now be stressed; the senior member is, in all probability, the representative of a district or state whose adherence to the dominant party is automatic and therefore need involve next to no doctrinal agreement with the President. In however faint and uncertain a fashion, a presidential candidate must have some programme, some views; his election represents some decision of a national majority. But in the one-party states or districts, the party label need mean nothing at all in national terms; the party problems may be purely local or sectional. The congressional leaders whom the President would have to take into his Council or Cabinet would tend to be politicians who

need not have any national views or weight and who would certainly be in such a strong local position that they could usually afford to differ from the President with impunity.

It is true that the landslides of recent years have upset many old political habits, that there are far more new members in both Houses than was usual ten years ago and that the great prestige of Mr Roosevelt has made even well-entrenched politicians reluctant to come to an open breach. But even so, Mr Roosevelt has had, in the main, to take the congressional leaders the seniority rule has given him and, although his support for one candidate of the proper standing has more than once turned the scale against another candidate of the same standing, it has taken all the presidential authority to do it—and to do it narrowly.

A Congress more nationally recruited would probably not need the locality rule to decide precedence among members, who would no longer be a collection of local magnates, each lord of his own seignory; but the locality rule is one of the deepest rooted American political habits. A Congress recruited under it does not provide a natural Cabinet system, even if the autonomy of the presidency were not, in its turn, a political habit of great antiquity and respectability.

III

That rank in the Senate committee hierarchy goes by seniority saves the difficulty of choice and respects the real and formal equality of Senators. It means that the Senators at the head of a committee have had the opportunity of mastering the business of the committee, and since no Senator who is lacking in political sagacity can stay in the Senate for more than a term, it means that the committees are led by masters in the daily business of politics. But it has grave limitations. A Senator who loses his seat, loses his seniority: even if he is re-elected he does not recover his old position on the roster, unless special concessions are made. The importance attached to seniority means that dodges are relied on to acquire the start in the race for power that high rank on a good committee gives. Thus Senator Bennett Champ Clark of Missouri was elected in 1932, but a friendly Governor nominated him to serve the last month of the term of Senator Hawes who, in an equally friendly spirit, had resigned. Thus Senator Clark acquired rank ahead of thirty new Senators elected in the Democratic landslide of 1932—and this, in turn, meant that a leading isolationist got a place on the all-important Foreign Relations Committee in 1939.

Of course, when party or personal needs justify it, new senators may get good assignments. When Henry Cabot Lodge became Chairman of the Foreign Rela-

tions Committee in 1919, determined to prevent the United States from entering Woodrow Wilson's League of Nations, he had four places to give away on the premier committee, places 'by tradition given to men of comparatively long and distinguished service. Of the four who now became Lodge's colleagues not one had completed a single term... but every one of the four was clearly to be recognized as an irreconcilable opponent of the League'.[1]

The seniority rule may help to distort the relationship between the President and the Senate. The policy of the administration may be strongly supported in the country and in Congress; the party majority, to whose existence the committee chairmen owe their authority, may be equally strong in support of the administration; and yet the fortunes of politics may put in positions of decisive importance enemies of the President or opponents of his main policies. The death of Senator Pittman in 1940 made Senator George Chairman of the Foreign Relations Committee—and Senator George had been so strong an opponent of the Roosevelt programme, that the President had attempted to secure his defeat in 1938. But on foreign policy Senator George sees nearly eye to eye with the President. But the almost equally important Naval Affairs Committee has for Chairman Senator David Walsh, a most violent opponent of the

[1] G. H. Haynes, *The Senate of the United States*, vol. II, p. 701. Among the four Senators appointed in this manner was Warren G. Harding.

foreign policy of the Roosevelt administration, orator on the same platform as Colonel Lindbergh and openly resolved to exert all his official weight to reinforce that of his personality and achievements. The deposition of a committee chairman is not impossible or quite unheard of, but it is in the nature of a *coup d'état* and offends the senatorial and American sense of the rules of the game—the belief that the rules are the game.

A link between Congress and the President that has lost most, but not all of its old importance, is that of patronage. In the good old days, before reformers imposed 'civil service' rules, that is admission and promotion by examination, on the greater part of the federal employees, the 'spoils' were one of the chief reasons why professional politicians rejoiced in victory. And a Senator or Congressman of the victorious party had a right to control the distribution of the spoils in his own state or district. On the other hand, a President had the right to punish a recalcitrant member of Congress by refusing to nominate his followers to post-offices, customs-houses and the other homes for the veterans of party war. A President's authority was greatest when he was newly in office, for then he had still the right to expect the gratitude due to a lively sense of favours to come. It waned with each job that he filled.

To-day, the President's patronage is confined to the more important jobs; ambassadors, federal judges, bureau chiefs are still often appointed to reward their

or their sponsor's party services. Yet there are still enough jobs to trouble a President. In the early days of the New Deal, there were reasonable complaints that even for important technical posts, political endorsement was needed. Some simple-minded scientists were startled to learn that their willingness to serve their country, at cost in time, money and comfort, availed not if they were not passed by the head of the Democratic machine, the Postmaster-General, James Aloysius Farley. At the same time 'the "rule" required that all federal appointees from New York City... be endorsed by Edward J. Flynn'.[1] (Mr Flynn, who has since succeeded Mr Farley as party chief, was then boss of the Bronx and presidential ally in the war against Tammany Hall.) Yet despite the possibilities of emergency agencies like the vast labour force employed by the Works Progress Administration, patronage, in its old sense, is less and less important as an nstrument of presidential control. This is, on the whole, an administrative gain, and it is not clear that it is a political loss.

A President can, it is true, win friends and influence people by giving jobs to them or to their friends. But he can also make enemies. He is forced by the exigencies of patronage to take sides in local fights with which he has no concern. It may matter not at all to him that he has to decide to give a federal judgeship to

[1] A. W. Macmahon and John D. Millett, *Federal Administrators*, p. 425.

the son of the National Committeeman rather than to the brother of the State Chairman.[1] But the decision may breed party dissension—and may also lower the efficiency of the federal judiciary. In Professor Corwin's opinion, 'the elimination of federal patronage would undoubtedly tend to undermine the local party machines, and to that extent transform the parties into organs of opinion pure and simple'.[2] This is only true if the local machines have no state patronage; otherwise the control over a state's representatives in Congress may have to be divided with the state 'Boss', whether he be a Senator, a Governor or a retiring private individual. But it is true that the most effective pressure a President can put on Congress is now that of the electors, not of the job-holders or job-seekers.

The dissipation of political responsibility in the American system makes the 'lobby' both necessary and powerful. It is rare indeed for effective legislation in Britain to come from any source but the government. Even the few private members' bills that become law usually do so thanks to the benevolent toleration or active aid of the government. It is only when the 'whips are taken off' that the average M.P. gets a chance to vote as his conscience or his fears guide

[1] The National Committeeman is the representative of the state party on the governing committee of the party. The State Chairman is the head of the state organization. In addition, the Senator or Senators of the President's party and possibly the Governor have to be considered too.

[2] E. S. Corwin, *The President: Office and Powers*, p. 290.

him—and such votes as that which defeated the Sunday opening of theatres suggest that the conscience of the average member is more tender than his fondest admirers have believed or that his courage is even less than the cynical have suspected. At Washington, the whips are far more often 'off' than they are at Westminster. Members of Congress have made far more promises and are in a better position to carry them out. Then in the committees where effective legislative work is really done, party lines are often faintly drawn, except in the case of politically dramatic measures. The lobbies take advantage of this situation. Candidates are cajoled and threatened; there is no Cabinet to take responsibility from individual shoulders, no possibility for a member who loses his seat, thanks to a vengeful pressure group, of being elected in another state. So the timid, the prudent, the doubtful succumb. But there are more lobbies than one. There are brewers as well as the Anti-Saloon League; there are reform organizations as well as 'machines'; there are trade unions as well as manufacturers' associations; there are cranks as well as crooks. The prudent as well as the brave politician defies too obviously worked-up agitations, the floods of telegrams that betray their common origin; the deputations in plain and fancy clothes that ask that he shall save the American way from Communism or American boys from imperialist war. Now that public opinion polls are part of the technique of American political life, the Congressman

pays as much attention to Dr Gallup or to *Fortune* as to the press or the pressure group. And of course, at all times, there have been politicians who had not only the courage of their convictions, but a hold on their constituents which ensures their immunity from the vengeance of minorities, however well organized. A Senator like Mr Norris can afford to disregard superficial manifestations of disapproval from Nebraska, because in many cases the good citizen of Nebraska does not know what his own opinion is until Senator Norris has announced *his* and, even if he differs from the Senator, he does not regard the state's chief citizen as a mere mouthpiece, but as an institution whose general rightness more than covers any particular error. It is easier for a Senator to take this line than for a Representative, since a state is a bigger constituency than a congressional district and pressure groups are more likely to cancel out, but a Congressman's natural backbone is stiffened by the reflection that many voters will be indifferent to the issue raised and others will be on the opposite side to the most vocal group. Nevertheless, the success of the Anti-Saloon League in intimidating politicians, long after the first credulous acceptance of prohibition had given way to cynical disgust, shows what a well-organized and ruthless bloc can do.

It is these conditions which make the presidential veto essential. It is true that its existence leads to a renunciation of responsibility by members of Congress

who acquire merit by voting for utopian or sectionally profitable schemes, confident that the President (who cannot escape direct responsibility) will rebuke the greed of the veterans or the pension mongers. And Congressmen have less scruple about voting for an absurd bill in its first form than they have about trying to override the presidential veto. The necessity for assembling a two-thirds majority to override the veto is, for this reason, a good deal less undemocratic than it looks on paper. As the elected choice of the whole people, the President, in Rousseau's language, represents the general will as against the mere aggregate of particular wills represented in Congress—even if what Congress has voted for always represents what Congress really wanted.

CHAPTER IV

The Political Role of the Supreme Court

'Bishop Hoadly has said: "Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes, and not the person who first wrote or spoke them", *a fortiori*, whoever hath an absolute authority not only to interpret the Law, but to say what the law is, is truly the Law-giver.'

J. C. Gray, *The Nature and Sources of the Law.*

I

No feature in the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been more frequently misunderstood, than the duties assigned to the Supreme Court and the functions which it discharges in guarding the ark of the Constitution. Yet there is really no mystery about the matter. It is not a novel device. It is not a complicated device. It is the simplest thing in the world if approached from the right side.[1]

Like his friend Dicey, but independently, Bryce illustrated the role of the American courts by the analogy of an English court dealing with 'the bye-laws made by an English railway company or municipal corpora-

[1] James Bryce, *The American Commonwealth* (2nd edition, 1889), vol. I, p. 237.

tion under powers conferred by an Act of Parliament'.[1] The analogy had a persuasive force which rested on a fallacy, and it has served (more in the Dicey than in the Bryce version) to darken counsel—on this side of the Atlantic at least.

Analogy is not argument, and even were the analogy between the powers of a British railway company and a state legislature or the federal Congress formally perfect, there would still be important and decisive differences arising out of the difference in scale and character between the board of directors of even a large railway company and the law-making body of the State of New York or of the United States.

But differences in form and scale are not the only or the most important reasons why the analogy falls to the ground. In the English case, the railway or the local authority is exercising a delegated political power to make bye-laws. That power is delegated from a known *omnipotent* political authority, Parliament, which controls the courts as completely as it controls the boards of directors or the county councils. No doubt the English courts have their own life, their own ambitions, their own ways of action. But the moment that they get 'above themselves' they can be reduced to order by an authority which the courts themselves recognize and on whose authority their own power to command obedience depends. The situation of an American legislature, state or federal, is very different.

[1] *Ibid.* vol. 1, p. 240.

American legislatures have important powers over the composition, the jurisdiction, the procedure of the courts. But they cannot, in state or in national politics, abolish the courts altogether or reorganize them with no regard to the fundamental law which, in theory, governs them and the courts alike. In theory, and to a considerable extent in practice, the English court has to bless the name of its maker who gives and takes away. And that maker is the 'High Court of Parliament'.

The American courts are not confined to putting local government bodies or public utilities in their place. They are, by custom if not by formal enactment, masters of their own creators. Or rather, both courts and legislatures are the creatures of the 'People' of the Union or of the states. The people has tied its own hands, those of the legislatures, and those of the courts; and while in theory 'the [American] People' can untie its own hands, yet since the voice of the People can only be heard in the elaborate amending process of the federal Constitution, and since that Constitution is the 'supreme law of the land', governing both state and federal powers, 'the People' is a kind of political Mrs Harris, a convenient myth for the Sairey Gamps of the American legal myth-makers, but very unlike that active and jealous maker of courts and councils, Parliament.

The supreme law-making power is the People, that is, the qualified voters acting in a prescribed way. The

people have by their supreme law, the Constitution, given to Congress a delegated and limited power o legislation. Every statute passed under that power conformably to the Constitution has all the authority of the Constitution behind it. Any statute passed which goes beyond that power is invalid, and incapable of enforcement. It is in fact not a statute at all, because Congress in passing it was not really a law-making body, but a mere group of private persons.[1]

But a body elected to make the laws of a great nation, and thinking it has made a law, is not reduced to being a mere collection of private persons by legal judgement. It is the Congress of the United States which has had its authority denied—or its presumptions rebuked. It is not a mere local government authority glad if it can escape a crippling surcharge or a railway company paying reluctant tribute to the parliamentary bar. The elected spokesmen of the American people, both Houses of Congress and the President in office if he has sanctioned the bill (and still more if, as has been customary in recent times, he has been its real begetter), have been told by a court, or by the Court, that they have exceeded their powers, and often they are told so in a form that makes it plain that even if they had the power to do what they have tried to do, they would have been flying in the face of all sound precedent and political decency. To compare the invalidation of a federal statute to a finding that a creature of

[1] *Ibid.* vol. I, p. 241.

Parliament has acted *ultra vires* is to conceal a substantial difference under a formal analogy.

Of far more serious interest is the view that judicial control in the American system arises, *inevitably*, from the facts that the United States is governed under a written constitution and is a federation. That control of legislation by the courts is a natural and necessary piece of governmental machinery in countries which have written constitutions and especially in countries which have written federal constitutions, is a widespread belief. This belief is, however, baseless. A written constitution may limit the omnipotence of the legislature, even although there are no legal barriers erected by the courts which prevent legislative disregard of the precepts of the fundamental law. In public and private life, men do not do all that they are not forcibly prevented from doing. Even in the American system, there are departments of the government practically free from judicial control; there are so-called 'political questions' which the Supreme Court, from modesty or prudence, refuses to deal with. And, in the spheres in which the President and Congress are free from judicial control, there is no conclusive evidence that they run amok, that they exploit to the utmost their brief and unaccustomed freedom. Indeed, since they can no longer put their political consciences out in the keeping of the judges, they may be more careful of the fundamental constitutional decencies.

But more conclusive than these considerations is the experience of another federal government with a written constitution.

The ultimate guaranty, then, of individual rights in Switzerland, as in France, rests with the legislative body as influenced and guided by the public sentiment of the nation. The legislature of Switzerland is the final interpreter of the constitution, subject only to a referendum by which such a decision may be changed. It is worthy of note that Switzerland with a federal form of government and a written constitution deliberately rejected the main feature of the American plan of judicial review, after a careful study and report on the plan by a group of experts.[1]

But there can be little doubt that the framers of the Constitution intended that there should be some form of judicial control of legislation, although it is hard to be certain what kind of control they contemplated and certain that modern judicial review has only a remote resemblance to the simple application of the question 'by what authority?' which is the gist of the famous leading opinion, *Marbury* v. *Madison*.[2]

[1] Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (2nd edition, 1932), p. 16.

[2] In this decision (1803) Chief Justice Marshall set out the simple doctrine in its classical form. 'The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.... If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and

The basic British illusion about the role of the Supreme Court arises from the assumption that its main role is to delimit the powers of government between the states and the Union. In the first fifty years of its existence that was a plausible doctrine. From the case of *Marbury* v. *Madison* to the *Dred Scott* case (1857) the Court invalidated no federal statute and its constitutional achievement was the extension of federal authority by decisions like those in *McCulloch* v. *Maryland*, *Gibbons* v. *Ogden*, *Cohens* v. *Virginia*. The Court under the lead of Chief Justice Marshall found reasons for upholding federal as against state power. And it also found reasons for limiting state power in favour of private corporations, as it did in the *Dartmouth College* case. Under Marshall's successor, Taney, the Court was more ready to support state authority against private individuals and corporations, as it did in the *Charles River Bridge* case. But its range of judicial-political activity was limited. Federal activity was intermittent and limited in scope, and the federal Constitution imposed few limitations on the legislative activity of the states. They were debarred from interfering with interstate commerce and forbidden to pass

oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law?... Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.'

laws 'impairing the obligations of contracts':[1] that was all or almost all that the Supreme Court had to work with. The fifth amendment, it is true, forbade the federal government to deprive persons of 'life, liberty, or property without due process of law', and even before the Civil War 'persons' were beginning to be thought of as including corporations, that is, commercial companies, and 'due process' of law was beginning to be thought of as more than mere regularity in procedure, as meaning natural justice.

It was the fourteenth amendment (1868) which limited state action as the fifth limited federal action that made easy the extension of judicial control of legislation from questions of the distribution of powers to the general wisdom and propriety of legislation, state or federal; that made possible and easy the transformation of the Supreme Court into a third chamber vetoing legislation on grounds of policy. Of course, the Court for long refused to admit what it was doing, but the public was less easily bemused by legal fiction than were foreign and native lawyers. What the Court was doing was not wholly novel. With the weapons at his disposal, Marshall had tried to protect private and vested interests against legal spoliation. 'As to the states Marshall had no due process clause, but to an extent he employed the contract clause to the same end.'[2] But it was in more than mere legal equipment

[1] Cf. *The Constitution*, Article I, Section 10.

[2] (Justice) F. Frankfurter, *The Commerce Clause under Marshall, Taney and Waite*, p. 75.

that the situation of the Court had changed. America had changed. Corporations were no longer babes but lusty and exuberant youths; states linked by rail and depressed in effective, if not in nominal status, by the result of the Civil War were no longer 'sovereign' except in form. Great and new social problems were demanding legal remedies, and the degree of freedom or limitation to be given to or imposed on such monsters of private enterprise as the railways and the great trusts was the fundamental question of American politics. The policy decided on, that of general encouragement to these great enterprises, and general discouragement of social legislation, was the work of the Supreme Court. Not only did it cripple both state and federal governments, but when it did permit them to exercise some of the attributes of sovereignty, it did so under the disguise of special and exceptional grants. It utilized vague terms like 'the police power' to justify the exercise of normal governmental powers and created an atmosphere in which the burden of proof, in most fields of economic legislation, was imposed on the law-making bodies. Nor was it a matter of dividing authority between state and Union, for powers denied by one decision to the states might be denied by another to the Union and the United States left impotent to legislate either in their separate or united capacity.

There were certain types of legislation, certain infringements of natural justice, certain intrusions into the domain of free contract that no government had a

right to enact except, possibly, the remote and passive sovereign, the 'People', a safe concession, for the People, if not dead, was certainly sleeping.

II

By the turn of the century, the real character of judicial review was increasingly recognized—at any rate by its enemies. The Supreme Court was not a mere court strictly construing a document granting powers, but a political body composed of lawyers discussing vague terms of political philosophy far more often than they were applying narrow and precise terms of legal art. It was the guardian of the Constitution, but the Constitution was the expression of a general political philosophy, not a mere grant of powers. Thus, in the case of federal legislation, the 'Bill of Rights' became not merely a list of guaranteed rights of which 'due process of law' was one, but a system of natural rights of which 'due process' was not merely the guarantee, but the essence. So that when the fourteenth amendment extended the protection of 'due process' to persons or corporations affected by state action, it extended with it almost all the guarantees of the federal Bill of Rights, whether these were also embodied in the state constitution or not. The Court was no longer bound to find a specific text in the federal or in a state constitution to justify its striking down legislation of which it disapproved. The 'supreme law of the land'

was now not the written Constitution, but a Platonic pattern laid up in heaven to whose essential nature the Constitution was only one clue. Almost universally discredited was the simple view set forth by Bryce, the view that the

> Constitution is a *self-speaking, self-enforcing* law, of which the Court is, as Montesquieu would have put it, 'merely the mouthpiece', or—in a more up-to-date idiom—a sort of loud speaker. Nowadays this notion or doctrine is embalmed in our constitutional law in the 'clear case' and 'all reasonable doubts' stereotypes, the recitation of which has long since become an established part of judicial ritual in offering up a legislative act.[1]

The ritual referred to is an old one. It is the uttering of the consecrated phrase that a court should not invalidate a legislative act '"unless the violation of the constitution is so manifest as to leave no room for reasonable doubt"'.[2] This principle, now universally admitted, in fact destroys the bye-laws analogy. If 'the constitution were a private letter of attorney, and the court's duty under it were precisely like any of its most ordinary operations',[3] it is hard to see why the Supreme Court should require this extra weight of proof, why it should so strenuously insist on giving the benefit of the doubt against the litigant who com-

[1] E. S. Corwin, *Court over Constitution*, p. 6.

[2] Chief Justice Tilghman of Pennsylvania (1811), quoted in J. B. Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' in *Legal Essays*, p. 17.

[3] *Ibid.* p. 15.

plains that what purports to be a statute is, in fact, only the decision of 'a mere group of private persons' as Bryce put it. There is no answer to this at this level. But the American courts have in fact realized

with more or less distinctness that this exercise of the judicial function does in truth go far beyond the simple business which judges sometimes describe. If their duty were in truth merely and nakedly to ascertain the meaning of the text of the constitution and of the impeached Act of the legislature, and to determine, as an academic question, whether in the court's judgment the two were in conflict, it would be, to be sure, an elevated and important office, one dealing with great matters, involving large public considerations, but yet a function far simpler than it really is. Having ascertained all this, there yet remains a question—the really momentous question—whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course—merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply—not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to other departments which the constitution has charged with the duty of making it. This rule recognizes that... the constitution admits of different interpretations; that there is often a range of

choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.[1]

'Whatever choice is rational is constitutional.' But in whose mind is the criterion of rationality? In the mind of the judges, for the 'Constitution is what the judges say it is'.[2]

At bottom, judicial review has come to mean that the Supreme Court determines not merely the allocation of power between state and Union or between different departments of the federal government, but that under the guise of interpreting those parts of the Constitution that limit powers or confer rights, the Court has the right to determine if admitted powers are being *reasonably* used.

It is true that the courts still assert that they have no concern with the wisdom, or policy, or abstract justice of the statutory measure examined by them, nor with the motives of the lawmakers, but, in fact, as is clearly evident, there is opened the way to a court, when judging as to the reasonableness of a law, to substitute its judgment for that of the legislature as to the expediency of the measure.[3]

[1] *Ibid.* pp. 21–2.

[2] Governor (later Chief Justice) Hughes, quoted in E. S. Corwin, *The Constitution and What It Means Today*, p. xxviii (8th edition).

[3] W. W. Willoughby, *The Constitutional Law of the United States* (2nd edition), vol. III, p. 1705.

That the Court, until very recently, did take the expediency of the legislation into account was obvious to all but the most obstinate legal myth-makers. A generation ago the judges may have been unconscious of what they were doing. It was the burden of the famous dissent of Justice Holmes in *Lochner* v. *New York* that his brethren, though they did not know it, were acting as if the fourteenth amendment had enacted 'Mr Herbert Spencer's *Social Statics*'. And despite the pious disclaimer of Justice Peckham that 'this is not a question of substituting the judgment of the court for that of the legislature', it was just that. For the majority opinion laid it down that

> if the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment.

But the Court held that New York had not the right to limit the hours of work in a bakery. Why? On any theory of the distribution of powers or the nature of the federal pact? No, because the majority held

> that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employé. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some

other trades, and is also vastly more healthy than still others.... Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual.[1]

III

Based on a doctrine of natural rights, the American Constitution was planned to be a 'government of laws and not of men'. In consequence, American political practice has shown some of the weaknesses of a legalistic attitude to the problem of organizing freedom. 'Do we then make void the law through faith?' The fathers of the Constitution—and the lawyers who have so coloured American life—would answer that so much faith was dangerous. So it is, and the belief that men could be kept in the narrow path of political righteousness by written restrictions was not a foolish or ignoble belief.[2]

But the consequences are serious. The division of powers, the existence of a federal system, the size of the

[1] Opinion of Justice Peckham in *Lochner* v. *New York* (1905). The thoughtless candour of the opinion was not made less damaging to the prestige of the Court by the fact that the overruling of the legislature of the greatest state in the Union had been followed by the overruling of its Supreme Court (strictly the Court of Appeals) and that this legal *coup d'état* was carried out by a bare majority of the Supreme Court of the United States.

[2] See Justice Cardozo's defence, p. 117.

country, the comparative rarity of genuine and general national issues make it in any case difficult to secure any sense of responsibility in the rulers of America, or any consciousness in the ranks of the electors that this is so. A belief that constitutional error will be rebuked and its ill effects undone by the courts may lead legislators and executives and, indeed, the people, to take too lightly their individual responsibility, may lead them to forget that what is constitutional may still be foolish or wrong, may breed a kind of political antinomianism. Or it may breed pessimism and political despair; so many political programmes ending in nothing but a judicial rebuke discourage the political energy of a people not very patient at the best of times.

Nor is this all. Judicial review breeds uncertainty and so disrespect for the law. Until a leading case has been decided, good citizens may, with a fairly clear conscience, evade obedience to a law they dislike. The spectacle of Mr Henry Ford using every possible legal device to evade his duties under the Wagner Labor Act, while it may not formally excuse violence by the trade unions whose rights are denied by Mr Ford's thugs and spies, certainly accounts for it in part. If American attitudes to the enacted laws of their country are startlingly individualistic to a European, some of the guilt must be imputed to the permanent uncertainty as to what *is* the law, that is created by the American doctrine that a statute has merely a claim to

being law unless the Supreme Court has certified its authenticity. And the variations in the judgement of the Court from time to time introduce the fresh complexity that what was declared *not* to be law, may suddenly become law when the Court has changed its mind.

Even as an instrument for protecting the rights of the American citizen as defined in the Bill of Rights, the Court is not as successful an instrument as might be expected.

Among liberals, the claim of the Supreme Court to respect as a guardian of civil liberties and the Bill of Rights has been taken with varying degrees of seriousness. In the last war, American public opinion displayed an intolerance not out of keeping with the national character. It had its comic side, as when sourkrout was renamed (unavailingly) 'Liberty cabbage', and a more serious side in the legal and illegal repression of dissent. For offences which in the case of Mr Ramsay Macdonald led to no more serious penalty than boycott at a golf-club, Mr Eugene Debs, the leader of the Socialist party, was sentenced to a long term of imprisonment and the administration of the Espionage Acts was (by the standards of those times) very rigorous. Even imperial Germany treated its political dissenters less severely than did the great republic. The Supreme Court did not attempt to limit the legislative excesses of Congress—which might have been less extravagant had the members of Con-

gress been less tempted to the heresy that whatever was constitutional was also right.

But in some cases, if the Court upheld the rigours of the law, there were eloquent voices on the other side. Mr Justice Holmes (who had written the opinion upholding the conviction of Mr. Debs) had to be convinced that there was a real intent to hinder the prosecution of the war and that 'the present danger of immediate evil or an intent to bring it about' was real. The first amendment, he held, had tied the hands of Congress; it was not free to do as it liked with the freedom of the press even in war time. That might be a thing to be regretted.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can safely be carried out. That, at any rate, is the theory of

our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[1]

This was finely said, but Justice Holmes did not convert the majority of the Court to these principles, and civil liberties were no better guarded in the United States, for all the solemnity of the Bill of Rights, than they were in countries that guaranteed nothing, or left the enforcement of such guarantees as there were to political moralists rather than to judges. In more recent times, the Court has acquired merit by the protection it has extended to minorities like the Catholics of Oregon, whose schools it saved from an intolerant legislature, and still more by the protection it has given to Southern Negroes who have seemed, at times, to be in danger of exchanging their old risk of illegal lynching for legal procedures that differed only from lynching by adding the insult of form to the fact of murder. In general, the Court has taken its duty of protecting civil liberties very seriously. But under the pressure of national crisis, legislation has again taken a repressive

[1] Dissenting opinion in *Abrams et al.* v. *United States* (1919).

turn and the Court, to some critical eyes, seems to have taken the same turning.

In a recent case (decided on 3 June 1940), eight of the nine members of the Supreme Court decided that religious freedom had serious limits, that local authorities could enforce the performance of patriotic rituals, and that parents, whose religious scruples forbade them to allow their children to take part in these rituals, had no remedy in law.

The denomination that imposed this veto on its members was not one to attract much sympathy. 'Jehovah's Witnesses' are a small, very fanatical and highly intolerant sect. One of the minor tenets of the Witnesses is a refusal to render unto Caesar certain formal honours. The School Board of Minersville, Pennsylvania, like most American school authorities, had laid it down that all children should salute the flag. Rituals of this kind play a great part in American life, being, indeed, the liturgy of the national religion of patriotism. The Gobitis family refused to permit their children to salute the flag and the School Board refused to admit them unless they did. There was, at any rate in Left circles, a good deal of surprise when the Supreme Court, now with a 'liberal' majority, overruled the court below and upheld the action of the School Board. Speaking for his seven brethren, Justice Frankfurter pointed out the complexity of the problem.

The manifold character of man's relations may bring his conception of religious duty into conflict with the

secular interests of his fellow men.... To affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious freedom.

And appealing to the tolerance for legislative follies that was the main judicial doctrine of his master, Justice Holmes, Justice Frankfurter ended:

Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

The sole dissenter was Justice Stone,[1] normally the most cogent defender of the right of elected persons to make fools of themselves—and of their electors.

History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection.... The Constitution

[1] Now (1941) Chief Justice.

expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist.[1]

The Minersville case reveals, indeed, one of the weaknesses of judicial review in the very field where its claims to respect are most cogent. For in as far as the American people have made of the Supreme Court something like a medieval Lord Chancellor, the 'keeper of the People's conscience', they have not had 'education in the abandonment of foolish legislation' nor the even more important education in not passing foolish legislation in the first place. And if the Court is now to withdraw its control, it will be some time before the American people will be accustomed to the responsibilities of walking alone.

IV

Since reverence for the action of the Supreme Court is an important part of American political religion, it is natural that many Americans should deplore, or at least see dangers in, the publication of dissenting opinions.

It is bad enough that the oracle should speak with divided voice, that the fact that there is dissent should be published. The difficulty of believing the dogma

[1] Texts from *The New Republic*, 24 June 1940.

that only in the clearest cases of incompatibility between the fundamental law and the act of Congress or of the state legislature does the Court invalidate a statute, is greatly increased when dissent is recorded. How can it come about that an incompatibility which is plain to Justice *X* is not plain to Justice *Y*? How can it come about that an incompatibility which is plain to five justices is not plain to the other four? This dangerous thought is made far more dangerous when different opinions are published. For in that case, the reasons for the judicial insight of one group and blindness of the other are laid open for lay and professional inspection. It not only happens that the layman sometimes thinks that the dissenters have the best of the argument, but that the professional organs do so as well. The Supreme Court may have the last word legally, but not until their decisions have been ratified by such great jurisconsults as Professor Thomas Reed Powell of the Harvard Law School have they the comforting assurance that they are having the last word scientifically, or that their decision will not appear in future treatises as one more of the errors of the infallible Court. The more sensitive justices of the Court are rather like Verdi in Browning's poem. No popular applause quite consoles them for the silence or the speech of the highly critical Rossinis of the great law schools![1]

[1] According to a modern legend, the Dean of one of these great law schools was introduced to the most irascible and

Nor is this all. The dissenting opinion may not only weaken the authority of the majority decision, it may have far more important future effects than the decision. In some famous cases, like *Lochner* v. *New York*, the majority opinion is only remembered because it is the dark background on which the searchlight of Justice Oliver Wendell Holmes played. For the future of American jurisprudence, dissents are often more important than opinions.[1]

But not only does the publication of dissenting opinions lead to confusion in the minds of the faithful, the publication of concurring opinions sometimes has this effect, too. For it is disturbing to the simple to

conservative member of the pre-Roosevelt court. 'So you're the young man who tells his students that we are fools?' 'Not at all, sir. We let them find that out for themselves.'

[1] A French student has pointed out that the attractiveness of dissents in part comes from the freedom that being in a minority gives their authors. 'Le dissenter n'est pas limité par la nécessité d'accords et de compromis qu'exige la rédaction de l'opinion de la majorité. Il est libre d'être lui-même, et lui seul. Il exprime sa conviction profonde et s'adresse autant à ses confrères dont il déplore la incompréhension qu'à l'opinion publique': Roger Pinto, *Des juges qui ne gouvernent pas*, p. 37. In this view, the dissenting justice, like the leader of an opposition which has no immediate prospect of accession to office, has a freedom of utterance denied to justices whose opinion is to have important immediate results. It is also worth remembering that 'it is not an uncommon phenomenon for minority opinions to be far superior in force to those of the majority, and yet for the doctrine of the majority to be right, and in the end to prevail': J. C. Gray, *The Nature and Sources of the Law* (2nd edition), p. 257.

see eminent lawyers coming to the same conclusion but by different roads and for superficially inconsistent reasons. The authority of the Court when it sanctioned the conquests of the Spanish War of 1898 was not increased by the fact that the majority found different reasons for coming to what was the easiest and safest conclusion.

Yet it is unjust—and only excused by the formal modesty of the justices themselves—to treat the duty or the Court as being identical with that of a mere tribunal. The House of Lords can say 'let justice be done though the heavens fall' and then let precedent and legal reasoning carry it into all realms of absurdity that may be open to it. Its professional zeal will be corrected by the action of Parliament, which can do substantial justice, whenever the results of the branded article are intolerable. But the Supreme Court has no such reassurance. Its mistakes are only remediable by the slow and difficult operation of a constitutional amendment, which in practice usually means not at all. Even where some bad decision is reversed by the sovereign people acting in its amending capacity, as was done when the sixteenth amendment (1913) undid the mischief of the decision in the income-tax case (1895),[1] the delay is no light matter. It is right, then, under whatever fig-leaf the current legal conventions make it advisable to wear, that the Court should take into its accounting the consequences of too technical an

[1] *Pollock* v. *Farmer's Loan and Trust Co.*

approach to its problems, too abstract a view of its duties. Since a violent clash between the political and judicial officers of the national system is to be deplored, it is not necessarily a proof of cowardice or lack of character if the Court does, as Mr Dooley suggested it did, 'follow th'iliction returns'. For to put it at a higher level:

> Under normal conditions the judicial mind is—and should be—more objective than the political mind. But when judges are confronted with cases whose repercussions radiate far beyond the immediate litigants; when the path of absolute judicial objectivity leads to disastrously impolitic decisions; when, in short, the members of the Court are called on to be legislators as well as judges, it is impossible—as it would be undesirable—for their verdict not to be influenced both by their personal views on the issues at stake and by concern for the consequences.[1]

This statesmanlike prudence is an old device of the Court. It has been plausibly argued that the grave results that would have followed a decision for the other side, rightly influenced the Court in the great political case of (Martin) *Luther* v. (Luther) *Borden* (1849). It was not only that the Court with self-regarding self-restraint refused to 'pass beyond its appropriate sphere of action' and took care 'not to involve itself in discussions which properly belong to other forums', but

[1] Dean Alfange, *The Supreme Court and the National Will*, p. 86.

that it bore in mind the profoundly disturbing consequences of reopening, years after it had been settled one way, the question of what had been the legal government of the state of Rhode Island. Under the device of calling this a 'political question' and so escaping from the duty of deciding it, the Court in fact acted with great political sagacity and a regard for more important interests than those of the mere litigants.[1] And dissenting members of the Court have properly and frequently called the attention of their colleagues to the imprudence as well as the impropriety of their too flagrant disregard of the political consequences of too bold an exercise of their veto powers. When the Court, upsetting its own previous decisions, in effect denied to Congress the power to impose an income-tax, the possible consequences of this bold usurpation were stressed by Justice Harlan.

> Great as is my respect for any view by it the Court expressed, I cannot resist the conviction that its opinion and decree in this case virtually annuls its previous decisions in regard to the powers of Congress on the subject of taxation, and it is therefore fraught with danger to the Court, to each and every citizen and to the republic.[2]

[1] 'In other words, there were certain practical considerations uppermost in the minds of the jurists, and the legal bases for these practical considerations were conveniently found in the concept of the separation of powers': C. G. Post, *The Supreme Court and Political Questions*, p. 107.

[2] Dissenting opinion in *Pollock* v. *Farmers' Loan and Trust Co.* (1895).

If those dangers have not proved so great as Justice Harlan feared, it is because, on the whole, the Court *has* behaved with prudence. Unlike the House of Lords in 1909, it has refused the advice of American Lord Milners: it has refused to 'damn the consequences'. When it *has* miscalculated, as it did in the *Dred Scott* case before the Civil War and in the secure years of 'normalcy' that followed the election of President Harding, it has paid for its mistake, not only by becoming the subject of direct attack, but in prestige and authority. If the Supreme Court of 1937 had not had to answer for some of the sins of the Supreme Court of the *Adkins* v. *Children's Hospital* era (1923), Mr Roosevelt might not have dared to launch his attack, and the Court's retreat from an impossible position might have been made in rather better order. Like Cavour's statesman, an American Supreme Court has always to possess the 'tact des choses possibles'. No body of the faithful is quite as faithful as the more arrogant and insensitive of the priesthood think. It has generally been the good fortune of the Court that its leaders have always been shrewd enough to make concessions, to retreat, if only into silence. So they have prevented the occasional revolt of good members of the American political church turning into a revolution, a revolution in which a spirit of Voltairian anti-clericalism would impose on the Court as crippling limitations as the National Assembly of France imposed on a Church that had continued to burn and

mutilate after the climate of opinion had decisively changed.

V

Given the character of the Court it is natural and proper that appointments should be made on other than purely legal grounds, that a President, in the exercise of the most important of his patronage rights, should wish to put on the bench not merely a distinguished lawyer, but a distinguished lawyer who thinks as he does concerning the commonwealth. That this is done is not denied, but the issue is confused by the assumption that ordinary party politics is what counts. In modern times, at least, this is not so. It is true that Republican Presidents normally appoint Republican judges, and this is even more true of Democratic Presidents, but far more important than nominal party affiliation is real social and political identity of views. 'Nothing has been so strongly borne in on me concerning lawyers on the bench as that the *nominal* politics of the man has nothing to do with his actions on the bench. His *real* politics are all-important.'[1] What a President appointing to the bench wants to secure is that his view-point will be represented while he is in office—and later. And this ambition is surely legitimate, for somebody's view-point must be, and a President without views of his own, or without any desire

[1] Theodore Roosevelt to Henry Cabot Lodge, quoted in P. H. Odegard and E. A. Helm, *American Politics*, p. 168.

to see them prevail even after he has left the White House, is too colourless a creature to be fit for his high office. But a President may have no opportunity to nominate to the bench, for justices are a long-lived race and, until very recent times, it could be said of vacancies on the bench what Jefferson wrote of all vacancies in his time, 'Those by death are few; by resignation, none'.[1] The truth and seriousness of this maxim was fully felt by Mr Roosevelt who, in his first term of office, had no opportunity to make a single appointment to a Supreme Court whose majority was in striking disaccord with the popular temper as revealed by the elections of 1932 and 1934. No President had ever followed up such a victory as that of 1932 with an increase in Congressional strength at the 'off-year' elections. But one part of the federal government was immune from the popular fever and from the powers of persuasion and coercion lodged in the President.

There was one obstacle to the carrying out of the programme of the 'New Deal', the Supreme Court. In a series of decisions, the main parts of the New Deal programme were invalidated. One decision, that condemning the N.R.A. (National Recovery Administration), was unanimous—and it was suspected that the President was not altogether sorry to be forced to abandon the administration of that cumbrous and

[1] C. R. Fish, *The Civil Service and the Patronage*, p. 35.

ineffective system of price fixing and restriction. But the invalidation of the agricultural programme, the A.A.A., was far more serious, since it upset a complicated administrative machine which was working well—and the arguments that justified the invalidation did not seem very convincing to those who read the great dissenting opinion of Justice Stone. And with Mr Stone were associated two of the most generally respected justices, Messrs Brandeis and Cardozo.[1]

It was noted, that is to say, that there was a permanent 'liberal' minority on the Court which made it harder to conceal the fact that the judges acted in accordance with their own political and economic views, not as the interpreters of a secret legal lore known only to the elect. No one could deny the legal learning of the dissenters; what made them differ from their colleagues was not law, but 'personal economic predilections', as Mr Stone put it.

The most startling decision was given just before the national nominating conventions met in 1936; the Court, by five votes to four, invalidated a New York

[1] Mr Brandeis had been appointed by President Wilson, Mr Stone by President Coolidge and Mr Cardozo, although a Democrat, by President Hoover. As an illustration of the irrelevance of formal party lines, it might be added that the most conservative and hostile of all the justices was Mr McReynolds, who had been appointed by President Wilson—appointed, so it was asserted, in order to get him out of the office of Attorney-General.

minimum wage statute. This decision was badly received even by conservative critics, for it denied to the states any power to regulate wages and it was certain that the same principles would deny the power to the Union. So neither state nor nation could legislate in this important field, and the true character of judicial review was made glaringly evident.

In the election of 1936, Mr Roosevelt beat all records, including his own. He carried all states but two and increased the already unwieldy Democratic majorities in both Houses. It was not unnatural that he should take this election as a mandate, among other things, to undo decisions like that in *Morehead* v. *New York ex rel. Tipaldo*, as Lincoln had taken his election in 1860 as a commission to undo *Dred Scott* v. *Sanford*.

As to how that was to be done, there was legitimate ground for difference of opinion. The formally correct method would have been to amend the Constitution so as to extend the meaning of the 'general welfare' clause of the preamble to the Constitution, or to take specific powers to do the things that the Court had forbidden the federal government to do. It is true that, in normal times, the remedy of a constitutional amendment was illusory. But these are not normal times.

The Republican candidate had accepted the nomination on the understanding that he would, if necessary, support a constitutional amendment giving the states power to legislate for minimum wages, maximum

hours, and working conditions—for women and children. The Democratic Convention had gone further. It declared for a

clarifying amendment...as shall assure to the legislatures of the several States and to the Congress...the power...adequately to regulate commerce, protect public health and safety and safeguard economic security.

Normally, reforms that required constitutional amendments to make them possible might be considered as dead or postponed for a generation. But the flexibility of the political structure had proved greater than had been anticipated in the dead, smug days of Mr Coolidge, and two amendments had recently been passed with reasonable speed.

But Mr Roosevelt had other views. Without consulting Congressional leaders or, it is believed, some of his closest private confidants or, if he did consult them, without taking their advice, the President had introduced into the Senate and the House a bill 'to reorganize the judicial branch of the government'. The proposed measure was long and elaborate; it included many ingenious and useful provisions for speeding up business and improving procedure; but the gist of it was the power it gave to the President to appoint additional judges to federal courts for each member of such courts who on attaining the age of seventy and having served ten years 'continuously or

otherwise'[1] should not have resigned. The total number of new federal judges was not to exceed fifty and the Supreme Court of the United States should not have its total membership increased to more than fifteen. The object of this provision was plain and its justification serious.

Supreme Court judges appointed by one President, for example judges appointed in the reactionary, passive and complacent days of Harding and Coolidge, might linger on to impede and even destroy the legislative programme of an immensely popular President elected and re-elected because he was the candidate as unlike Harding and Coolidge as the electorate could find. By its life tenure and its lack of any retiring system, the Supreme Court was rather like the Canadian Senate. In Canada, when the swing of the pendulum brings the opposition into office, it normally finds that the defeated government has used its appointing power to fill the Senate with good party men. So, for the first year or two of a new government, the party with a majority in the Canadian House of Commons is faced with a hostile majority in the Senate. But not only is the Canadian Senate a rather futile body anyway, but it is large enough for death to provide a sufficient number of vacancies. No Canadian

[1] The then Chief Justice, C. E. Hughes, had served on the Supreme Court as an Associate Justice (to give the eight ordinary members of the Court their official style), but had resigned to run against President Wilson in 1916. He had been appointed Chief Justice by President Hoover.

Prime Minister has had to spend a whole term of office with no chance to alter the balance of the Senate.

The President's object was obvious enough, although it was coyly concealed beneath technical and useful provisions for procedural reform. If the present majority of the Court would not read the lessons of the times, the Court would have to be given a new majority. The President, that is to say, proposed to 'pack the Court'. Since the Court acts like an upper house, it is natural that the equivalent of the making of peers to carry a bill should be at any rate contemplated. But the number of peers is unlimited, while the size of the Court is determined by statute. The President or Congress must wait for death or illness, or admitted incapacity, to lead to vacancies, and Justices are remarkably long-lived and far from hypochondriac. Or the Congress can, if it has the courage, increase the size of the Court. The most famous instance of 'packing' the Court occurred under President Grant when the Court, under the lead of Chief Justice Chase, declared unconstitutional the issue of legal tender notes by Secretary of the Treasury Chase during the Civil War. This display of independence was not widely welcomed and two fortunate vacancies (one created by an increase in the size of the Court) made it possible for President Grant to nominate men whose views were less pedantic.[1] The Court, thus reinforced, changed its

[1] Whether this should be called 'packing' or not is a mere matter of nomenclature. The President did not ask the future

mind, and the whole price and currency structure was saved from a revolutionary decision.

This precedent was much quoted by friends of the President's proposals; but all this had happened a long time ago, and it was one thing to increase the size of the Court by one and quite another to increase it by seven. A storm of protest, rhetorical, sentimental, patriotic, neurotic, reasoned and reasonable burst. The Republicans, still stunned by their near annihilation at the elections of 1936, hoped rather than believed that the President had made a political mistake; conservative Democrats, regretting the party necessity that had made them pay formal allegiance to the New Deal, saw their chance to restore the balance of power within the party—and it was to them that the Republicans prudently left the battle in the Senate. The professional patriots, the 'viewers-with-alarm', simple-minded people nourished on the myth of an impartial and non-political Supreme Court, timid minorities like the Catholics, business interests seeing in the existing Court the only barrier to social legislation that they deemed 'Communistic', all joined in the chorus of

justices whether they would be sound on the currency question. But '"he knew that Judge Strong had on the bench in Pennsylvania given a decision sustaining its constitutionality, and he had reason to believe Judge Bradley's opinion tended in the same direction... while he would do nothing to exact anything like a pledge or expression of opinion from the parties he might appoint to the bench, he had desired that the constitutionality should be sustained by the Supreme Court"': Allan Nevins, *Hamilton Fish*, pp. 306–7.

abuse. But so did better-informed and more critical people.

If the American people do not rise up and defeat this measure, then they have lost their instinct for liberty and their understanding of constitutional government. Let them consider the precedent they will have consented to if they do not defeat it. If by legislative act one President can oust two-thirds of the Supreme Court, or pack the court till it does his bidding, what is to prevent another President from doing the same thing? Mr Roosevelt, if he has his way, will make a court that has scant respect for many vested and historic rights. His successor might be swept into office by a tidal wave of reaction such as not uncommonly is provoked when progressives over-reach themselves. If Mr Roosevelt can oust the court created by Wilson, Harding, Coolidge and Hoover, his successor may feel called upon to oust the rump court created by Roosevelt. And a new court might very well find ways of abridging the Bill of Rights as Mr Roosevelt's court would find ways of centralizing legislative authority.[1]

This fear was in many, if not all, cases perfectly genuine. It was believed that the bitter opposition of Senator Wheeler was, in part, based on his reasonable dislike of any reform that freed, or seemed to free, the executive from judicial control. He could remember the days when the federal Department of Justice was controlled not by that good Connecticut Democrat, Mr Homer Cummings, but by that good Ohio Repub-

[1] Walter Lippmann, *The Supreme Court Independent or Controlled*, p. 7.

lican, Mr Harry Daugherty. And Mr Daugherty had strained the resources of the federal law-enforcing machinery to punish Senator Wheeler for his inconvenient curiosity about the administration of justice and the profits of that administration. Complete trust in the executive branch came rather hard to persons who could remember the Harding administration!

The fight over the bill took place before the Senate 'Committee on the Judiciary' and for months the committee room was full of curious spectators listening to the stream of witnesses testifying, with varying degrees of relevance, for and against the bill. The public learned—or could have learned—from a series of very expert witnesses from the great law schools how far from simple was the theory and the practice of judicial review. It could also learn, from non-legal witnesses, how deep were the roots that the Court had struck down into American life. At first it was assumed that the bill was sure to pass; then that a compromise measure would pass adding two or three members to the Court; but the President refused to compromise and, with the death of the Senate leader, Joe Robinson of Arkansas, the bill was doomed. The most popular and powerful President in American history had attacked the only American institution rivalling the presidency in emotional prestige—and he had been defeated.

Or had he? For the Court which was saved in June was very different from the Court which was attacked

in February. It was not only that Justice Van Devanter, taking advantage of a hastily passed law enabling justices to retire on a pension, had resigned and given Mr Roosevelt his first opportunity to appoint to the Court, but that the old Court had had a Damascus vision. While its incurable conservatism and stubborn denial of legislative rights were being denounced in the Capitol, the old Court, in the new court building a few hundred yards away, was accepting such radical legislation as the Wagner Labor Act and an Oregon act for establishing a minimum wage for women, and openly recanting some of the past decisions that had most infuriated the radicals. Death and resignations have deprived Mr Roosevelt of one real grievance. He has already appointed a majority of the Court and it is probable that in his third term he will have appointed an overwhelming majority of the Court.[1] As automatically as the old Court vetoed bold legislative measures, it now approves them; and the spectacle of the Court adoring what it had so recently burned has had less effect on its prestige than a foreigner might have expected.

But a necessary consequence of the final character of Supreme Court decisions is the freedom with which the doctrine of *stare decisis* is treated. It is all very well for tribunals like the House of Lords, subordinate to

[1] Since this was written, Mr Roosevelt has appointed two new justices, a total of seven, and has made Justice Stone Chief Justice, leaving Justice Roberts the only member of the Court who does not owe his present position to Mr Roosevelt.

active law-making bodies, to stick to precedent and to leave the remedying of past legal errors to the legislature. The House of Lords can afford to indulge in the narrow virtue of consistency. But the Supreme Court is normally supreme; it has, in ninety-nine cases out of a hundred, the last word. It must be prepared, then, to override itself. Often it does this by inventing fictitious distinctions; by concealing its change of ground by a conjurer's patter. Or, on a higher level it can be asserted that 'however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court. "To the decision of an underlying question of constitutional law... no finality attaches. To endure it must be right."'[1]

But this method of evading awkward precedents is itself based on a fiction, that the Court only scrutinizes the plain text of the Constitution. But, as has been said, the Constitution as the courts use the term is not the plain text of 1787 with its formal amendments, but the traditional body of doctrine of which the Constitution is the heart but not the whole. A bolder and more satisfactory reply is the reduction of the doctrine of *stare decisis* to its proper place as a mere rule of convenience and a concurrent admission that the Court has been wrong in the past, but does not propose to be obstinate in error.

[1] Charles Warren, *The Supreme Court in United States History*, vol. III, pp. 470–1. The quotation is from Everett D. Abbott, *Justice and the Modern Law*.

It is usually more important that a rule of law be settled than that it be settled right. Even where the error in declaring the rule is a matter of serious concern, it is ordinarily better to seek correction by legislation. Often this is true though the question is a constitutional one. The human experience embodied in the doctrine of *stare decisis* teaches us, also, that often it is better to follow a precedent, although it does not involve the declaration of a rule. This is usually true so far as it concerns a particular statute, whether the error was made in construing it or in passing upon its validity. But the doctrine of *stare decisis* does not command that we err again when we have occasion to pass upon a different statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken.... The many cases on the commerce clause in which this Court has overruled or explained away its earlier decisions show that the wisdom of this course has been heretofore recognized.[1]

In this particular case, Mr Brandeis was on the losing side, but the principle laid down has been increasingly followed, and in the great turn-about in court doctrine which began in 1937 one aspect of the change that has been generally welcomed has been the frankness with which the Court has openly discarded some of its previous decisions like *Adkins* v. *Children's Hospital*, and has refused to waste time in pretending that the statutes which it now upholds differ in any substantial way from those it recently condemned.

[1] Dissenting opinion of Justice Brandeis in *Di Santo* v. *Pennsylvania* (1927).

VI

So many absurd things were said in defence of the Court during the great crisis of 1937; so many inconsistent defences, so many fantastic imputations of motive were made, and so much of the controversy was naturally if unfortunately mixed up with the question of the methods whereby the President proposed to end the constitutional deadlock, that the real case for a reverent and prudent handling even of the abuses of the system was rather neglected. President Dodds of Princeton, admitting that the Court did enter 'the field of political questions', argued that there was all the more reason to exercise vigilance 'to protect our finest political tradition, the judicial independence of the Supreme Court'.[1] Miss Dorothy Thompson (like President Dodds giving evidence before the Senate Committee) stressed the danger

> that reforms, often very good and much needed reforms, should be rushed through at a rate in which they cannot be digested in society.... It is that the will of powerful pressure groups, even when such groups embrace a majority of voters, should find expression in total disregard of the feelings, apprehensions, and interests of large and important minorities.[2]

[1] *Reorganization of the Federal Judiciary Hearings before the Committee on the Judiciary United States Senate Seventy-Fifth Congress, First Session*, Part I, p. 618.

[2] *Ibid.* p. 861.

Here the Supreme Court is being openly defended as a conservative upper house performing a function of great value in a society whose internal strains are great and where what simple-minded commentators call the 'democratic technique of majority rule' may easily prove unworkable, if a simple majority is given legal omnipotence because of its arithmetical superiority.

But the best defence of judicial review, at any rate in the field of constitutional guarantees where its activities have been most often and most vigorously condemned, was made long before 1937 by a great judge who was later to adorn the Court he then defended.

The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith. I do not mean to deny that there have been times when the possibility of judicial review has worked the other way. Legislatures have sometimes disregarded their own responsibility, and passed it on to the courts. Such dangers must be balanced against those of inde-

pendence from all restraint, independence on the part of public officers elected for brief terms, without the guiding force of a continuous tradition. On the whole, I believe the latter dangers to be the more formidable of the two. Great maxims, if they may be violated with impunity, are honored often with lip-service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to changing social needs.[1]

The conditions are not to be neglected. It has seldom been the fact of the exercise of judicial review, but the neglect by the Court of the need for 'insight into social values' and for 'suppleness of adaptation to changing social needs', that has brought storms about the heads of the justices. The ambiguity of the position of the Court in the hearts of the people, if not in the heads of the lawyers, has been one cause of the trouble. For the belief in the magical applicability of legal terms and methods to the complex problems of modern society, however convenient to the national

[1] Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921), pp. 92–4.

priesthood, has had to be paid for in public anger when the formulas obviously do not fit and when the judges have not had the courage to act openly as a political body. And it may be argued that the Court has for its main function to-day the mitigation of bad political habits which its practice in the past has made second-nature to the American politician—irresponsibility, indifference to minority rights and feelings, disregard for the long view, immunization against 'the glow of principle'. But it is too late to remake the political habits of the American people, too late and too risky to pull out the thread of the national fabric that the rule of lawyers constitutes. No one who so tampers with the political clothing of a nation can be sure that in pulling out the thread he is not unravelling the whole garment and leaving the nation naked to all the winds of doctrine that may blow upon it. At any rate, there is no sign that the American people will take this risk.

They do, however, understand better than they did that the Court is a political body or, at any rate, that it must have a political attitude, that there is no secret fount of purely judicial wisdom to which only lawyers have access. A turning-point in the public attitude to the Court's functions came when the role of the Court as a body deciding the policy of legislation was freely admitted. In his brief in defence of Oregon legislation limiting the hours of work for women, Mr Brandeis (as he then was) devoted the greater part of his brief to evidence

showing that women were different from men and suffered more from long hours, evidence that would have been highly relevant if given before a parliament or a royal commission, but which was only relevant to the case before the Court[1] if the Court was acting as a kind of upper house. And some critics, while rejoicing that the Court upheld the statute, did not approve of this frank admission by Mr Brandeis that the Court was entitled to discuss and decide the wisdom and appropriateness of legislation. They preferred the attitude of Justice Holmes, which was based on the view that legislatures where they had a right to legislate were as good judges of the wisdom of legislation as justices could be—and that their judgement as legislators was entitled to more respect than that of a Court whose business was with law and not policy.

The attitude of the Court to-day is less that of Justice Brandeis than that of Justice Holmes. No doubt the new majority are 'liberals', but they are more disposed to let the representatives of the people make their own mistakes than to educate them or coerce them into ways of righteousness. The testimonial given by an eminent New Dealer to Chief Justice Stone could now be given to the majority of the Court.[2]

[1] *Muller* v. *Oregon* (1908).

[2] 'Justice Stone is neither "liberal" nor "conservative"—*he is a judge who believes in the Court's minding its own business, and not interfering in legislative matters.* He is, in fact, personally a Republican Conservative. But he is one of the few justices, liberal or conservative, who in recent history has not injected

Thus the Court has refused to prevent states in effect setting up trade barriers in the guise of inspection laws or regulation of road traffic. Congress has power to stop this abuse if it wants to—and it is up to Congress to do its duty; it is not the duty of the Court to legislate in the guise of judicial action, because Congress has failed to protect interstate commerce.

It may be that the time for a fundamental change in American institutional methods has come. The growth in federal authority and in the range of federal activities has been so great, the political system has shown such unexpected elasticity, that the old function of the Court may be better performed by the normal political bodies. But if the great days of the Court as a super-legislature are over, it is well to remember what justified those political activities which brought so much natural criticism round the ears of the judges. Judicial review in America has

been able to establish itself, develop itself and make itself respectable [and] despite the existence of representative government, it has been able to protect minorities or individuals against the legislators, because despite its theoretical invocation in the text of the constitution, there has been no effective American people capable of delegating sovereign powers to its representatives.[1]

his own prejudices into an opinion': Maury Maverick, *In Blood and Ink*, p. 141.

[1] Jacques Lambert, *Histoire Constitutionnelle de l'Union Américaine A la recherche d'un Gouvernement National Du Contrôle de Constitutionnalité des Lois au Gouvernement des Juges*, p. 262.

It has been an integrating, a nationalizing force. It has minimized the disrupting and centrifugal forces inherent in the existence of forty-eight 'sovereign' states. This function is one whose importance no one can deny and Justice Holmes, who could contemplate with calm the loss of power to invalidate a federal statute, saw great dangers in the loss of the power to invalidate state statutes. With all its imperfections, judicial review has preserved and strengthened federal authority far better than it has been possible to do it in such federations as Australia or Canada. By its very superiority to narrow legal considerations, the United States Supreme Court has been better fitted to this task than the Canadian or Australian courts and the House of Lords have been.[1] In a vast country, of mixed

[1] On the theory that there was a permanent struggle for jurisdiction between states and federation and that the state courts could always be relied on to push to the utmost the claims of the states, there was no appeal from the decision of a state supreme court invalidating a statute on the ground of incompatibility with the federal Constitution. But as this theory was a fiction, state courts were able, under the guise of applying the 'due process' clause of the fourteenth amendment, to invalidate much social legislation without giving the state a chance to appeal from 'its' courts to the federal courts which might and often did take a more liberal view. In any case, the closing of this avenue of appeal meant that there were serious differences in what was constitutional between state and state and the view that the federal constitution gave a plain answer to questions put by legal experts was further discredited. Congress in 1914 dealt with this problem by allowing the Supreme Court by writ of *certiorari* to bring such cases as it thought important before it, even where the state courts had taken a 'federal' view. It was a reasonable recognition of the fact that the true parties

population, with great differences in economic and cultural levels, the Court has been a unifying and harmonizing force. Perhaps mere majority rule, even the rule of a more temperate and tolerant majority than American politics normally produces, would have destroyed the unity of the nation or provoked more civil wars than one. Slowness to make necessary adjustments, timidity in fundamentals, a conservatism that is almost entirely negative, these have been marked faults of the American system of government and the Court has not done much to lessen them. But they are the price (and not too high a price) that the United States have paid for being united, for not being Europe—and rule by judges is better than anarchy by soldiers. It has been said of several Chief Justices that 'no man could be as wise as Chief Justice Blank looks'. And no court could be as public-spirited, as sagacious, as impartial as American mythology makes the Supreme Court to have been from its beginning. But it has been the greatest judicial body in the world for over a century, with a unique function to fulfil. And it has fulfilled that function best when it really acted as a political body, when it remembered the real and permanent meaning of the counsel of its most famous chief: 'We must never forget, that it is a *constitution* we are expounding.'[1]

at issue were not the States and the Union but the States as legislators and individuals and corporations anxious, for whatever motives, to limit state legislative power.

[1] Chief Justice Marshall in *M'Culloch* v. *Maryland* (1819).

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